IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1912.

No. 610.

Home Telephone and Telegraph Company,

Appellant,

vs.

City of Los Angeles, et al.,

Appellees.

BRIEF OF APPELLANT.

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Home Telephone and Telegraph Company, *Appellant,*	
vs.	
City of Los Angeles, et al., *Appellees.*	

BRIEF OF APPELLANT.

FIRST.

STATEMENT OF THE CASE.

This appeal is prosecuted by the complainant from a decree of the District Court dismissing its amended bill, for supposed want of jurisdiction. The suit was brought to enjoin the enforcement of an ordinance of the defendant city prescribing the rates to be charged by the complainant telephone company.

Allegations of Amended Bill.

The allegations of the amended bill are substantially as follows [Rec., pp. 4 to 37]:

That the complainant is a corporation of the state of California, with its principal place of business in the city of Los Angeles, and is the owner of, and operating, a telephone system within the city, under a franchise from the city, for the term of fifty years from the 8th day of February, 1902.

That this franchise is not an exclusive franchise, and there has been and now is in operation, a competing telephone system within the city of Los Angeles, owned and controlled by the Pacific Telephone & Telegraph Company, a corporation of California.

That the city of Los Angeles is a municipal corporation, duly incorporated under the laws of California, and situated in the county of Los Angeles, in the southern division of the southern district of the state of California.

The capacity in which the remaining defendants, besides the city of Los Angeles, are sued, is then set forth in the usual form.

That the constitution of the state of California permits any city, containing a population of more than 3500 inhabitants, to frame a charter for its own government. That after its adoption by the electors of such city, at an election held for that

purpose, the charter must be submitted to the legislature of the state, for its approval or rejection as a whole, without power of alteration or amendment, and if approved, it shall become the charter of such city, and the organic law thereof.

That it is further provided in the said constitution, that cities and towns in the state of California, and all such charters, except in municipal affairs, shall be subject to and controlled by general laws.

That under said provisions the electors of the city of Los Angeles duly adopted a charter for said city, which charter was duly approved by the legislature of said state on the 31st of January, 1889.

That in and by the provisions of the said charter, as amended, the state of California has delegated to the city of Los Angeles the power to fix and determine the rates or compensation to be collected for telephones and telephone service and connections.

That said charter specifically provides that the board of public utilities of the city of Los Angeles shall have the power to fix, subject to approval, change or modification by the council of the said city, the rates to be charged and collected for such telephone service in the said city.

That on or about the 13th day of June, 1911, under the aforesaid provisions, the said board of public utilities adopted a resolution purporting to

fix the rates to be charged and collected by complainant and its competitor, the Pacific Telephone & Telegraph Company, a corporation, for telephones, telephone service and telephone connections in the city of Los Angeles, during the year commencing July 1, 1911, and ending June 30, 1912. A copy of this resolution is attached to the amended bill as exhibit A. [Rec., p. 20 *et seq.*]

That thereafter objections to the rates so fixed by said resolution were duly filed, and the council of the city of Los Angeles ordered a rehearing. That after such rehearing, on the 28th day of July, 1911, said council duly passed an ordinance purporting to finally fix the rates to be charged and collected by complainant for telephones, telephone service and telephone connections in the city of Los Angeles during said year, a copy of which is attached to the amended bill of complaint as exhibit "B." [Rec., p. 27 *et seq.*]

That the schedule of rates fixed by said ordinance was much lower than the rates prescribed by said resolution of the board of public utilities, and was wholly unreasonable, inadequate and confiscatory.

That complainant, finding itself compelled to seek relief through judicial proceedings, against the unjust and confiscatory rates prescribed by said ordinance of July 28, 1911, has since the passage of the ordinance caused a wholly new in-

ventory and appraisement of its properties to be made.

That this inventory and appraisement is based upon a careful and detailed examination and investigation of all parts of the properties and plant of complainant, and of the present value thereof, except such parts as were exhibited in detail by existing records. That every endeavor has been made to make such inventory and appraisement complete and accurate, and for this purpose complainant has delayed the filing of its original bill of complaint. That said inventory and appraisement was finally completed in November, 1911, and gives the valuation, as accurately as possible, of complainant's physical properties at the close of business on the 30th day of June, 1911.

A schedule of the values of the different classes of complainant's physical properties is then set forth, showing a total valuation of $6,926,457.55. [Rec., fol. 13.]

That said summary and table of values does not contain any estimate of, or allowance for, the value of complainant's franchise, nor the value of complainant's telephone business and telephone system as a going concern, nor the value of the good will of said business or system, nor any value of, or allowance for, working capital. That complainant is justly entitled to a reasonable return on these intangible assets, as well as upon the value of its physical properties.

That the total gross earnings derived from the operation of complainant's telephone system inside said city, was the sum of $1,192,622.89. A particular statement of said gross earnings, showing the several sources, is then set forth. [Rec., p. 11.]

That the actual and necessary current expenses of complainant's said telephone business in the city of Los Angeles, during the year commencing July 1, 1910, together with the average annual allowance necessary to be provided on account of losses due to depreciation and absolescence, amounted to the aggregate sum of $1,153,849.69. Then is set out a particular statement of these expenses. [Rec., p. 13.]

That the net returns of complainant's said telephone system in the city of Los Angeles, during said year commencing July 1, 1910, amounted to only .5597 of one per cent upon the value of the aforesaid physical properties comprised in complainant's said telephone system, and necessarily used in the operation thereof during said year.

That the rates charged and received for said services, during the year commencing July 1, 1910, were substantially the same as the rates attempted to be fixed by said ordinance of July 28, 1911, for the year commencing July 1, 1911.

That the rates fixed for the year commencing July 1, 1910, were so fixed by an ordinance adopted by the council of the city of Los Angeles

against the protest of complainant, and notwithstanding the board of public utilities recommended to said council the adoption of a materially higher schedule of rates.

That complainant refrained from seeking relief by judicial proceedings, from the rates fixed by said council for said year commencing July 1, 1910, in order to avoid vexatious litigation and the loss of the good will of the public, and in order that the precise effect thereof upon the net returns of the business of complainant might be determined by actual experience, and in the hope that a more just and reasonable schedule of rates would be voluntarily fixed by said council for the year beginning July 1, 1911, and succeeding years.

That said council's action in fixing the rates beginning July 1, 1911, was without receiving or seeking any further evidence concerning the value of complainant's properties, or the actual returns of complainant's business, during the year commencing July 1, 1910, or of the rates prescribed for similar telephone services rendered under similar conditions in other cities of the United States, and that said council set aside the action of the board of public utilities without any just cause or reason therefor.

That said ordinance of July 28, 1911, makes it a misdemeanor, punishable by fine or imprisonment, or both, for complainant, or any officer or

agent thereof, to demand, charge, collect, or receive, any rates in excess of the rates purporting to be prescribed by said ordinance, and that if complainaint violates its said ordinance in any of these particulars, complainant and its officers will be subjected to numerous criminal prosecutions under said ordinance, and numerous suits by individual patrons or subscribers, seeking to compel complainant to furnish telephone services at the rates purporting to be prescribed by said ordinance of July 28, 1911. That complainant has upwards of thirty thousand patrons or subscribers to whom services are rendered from month to month. That complainant accepts payment of the ordinance rates only under protest, and reserving the right to hereafter collect such additional compensation as may be judicially determined to be reasonable.

The amended bill prays for an adjudication that the said ordinance of July 28, 1911, is void because in contravention of the constitution of the United States, in that, if said ordinance is enforced, the state of California will thereby deprive complainant of its properties without due process of law, and will deny to complainant the equal protection of the laws.

Defendants' Plea.

The defendants filed a plea challenging the jurisdiction of the court, and alleging that the constitution of the state of California provides that "no person shall be * * * deprived of life, liberty or property without due process of law," and that the complainant, a citizen of the state of California, has never invoked the aid or protection of its said state to prevent the alleged taking of its property, nor appealed to the courts of said state to enforce the law of said state. [Rec., pp. 35-36.]

Decree of Dismissal.

The foregoing plea having been duly heard by the court, was sustained, and a decree thereupon entered dismissing the complainant's amended bill for want of jurisdiction. [Rec., p. 40.] The court adopted as its opinion in support of such dismissal the opinion which it had previously rendered in the cause upon motion for an injunction *pendente lite* to which motion defendants had responded by demurrer, alleging want of jurisdiction. [Rec., p. 41.]

Question Involved.

The sole question presented by this appeal is therefore the jurisdiction of the District Court; and in that behalf the only contention of the defendants is that the ordinance of the defendant

city council purporting to prescribe the rates to be charged by the complainant is not the act of the state of California within the meaning of the fourteenth amendment to the federal constitution, because the state constitution also forbids the deprivation of property without due process of law.

A motion to advance the cause in this court, under rule XXXII, has been made, and the cause is now submitted by the appellant on that motion.

SECOND.

Specification of Errors Relied On.

1.

The court erred by its decree, in that it did not hold that complainant's amended bill of complaint stated a cause within the jurisdiction of the court.

2.

The court erred by its decree, in dismissing complainant's amended bill of complaint.

3.

The court erred by its decree, in holding that the acts of the council of the city of Los Angeles, complained of in complainant's amended bill of complaint, were not state action within the meaning of the fourteenth amendment to the constitution of the United States.

4.

The court erred by its decree, in holding that

the acts complained of in complainant's amended bill of complaint, did not deprive complainant of its property without due process of law, within the meaning of the constitution of the United States.

5.

The court erred by its decree, in holding that the acts complained of in complainant's amended bill of complaint, did not deny to complainant the equal protection of the laws, within the meaning of the constitution of the United States.

6.

The court erred by its decree, in holding that it had no jurisdiction to determine whether the acts of the council of the city of Los Angeles, state of California, in determining and fixing telephone rates, in the ordinance of July 28, 1911, attached to complainant's amended bill of complaint as exhibit "B," under and by virtue of the power in the charter of the city of Los Angeles, and complained of by complainant in its amended bill of complaint, were unreasonable, unjust and confiscatory, within the meaning of the constitution of the United States, or the fourteenth amendment thereto.

THIRD.

BRIEF OF ARGUMENT.

I.

Jurisdiction of Federal Courts Under the Fourteenth Amendment, to Enjoin the Enforcement of Public Utility Rates Prescribed Under Legislative Authority.

The comprehensive reach of the prohibitions of the fourteenth amendment, and the character of the jurisdiction which has resulted therefrom to the federal courts of first instance, are subjects on which this court has frequently declared itself. On the first point, the inhibitive scope of the fourteenth amendment, the doctrine of these decisions was thus restated in an opinion delivered by this court at October term, 1907:

> "The provisions of the fourteenth amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts."
>
> Raymond v. Chicago Union Traction Co., 207 U. S. 20.

In another case decided at the same term, which involved a controversy precisely like that now before the court, namely, an attack upon rates, prescribed under state legislative authority, as a deprivation of property within the meaning of the fourteenth amendment, the nature and ex-

tent of the original jurisdiction of the federal courts in such cases was very thoroughly examined and discussed. Answering the contention there made, that no federal question was involved in such a case because it presented no controversy as to the *construction* of the constitution or laws of the United States, this court said:

> "Jurisdiction is given to the Circuit Court in suits arising under the constitution or laws of the United States (18 Stat. L. 470, Chap. 137), and the question really to be determined under this objection is whether the acts of the legislature and the orders of the railroad commission, if enforced, would take property without due process of law, and although that question might incidentally involve a question of fact, its solution is one, nevertheless, which raises a federal question. See Hastings v. Ames (C. C. App. 8th C.), 15 C. C. A. 628, 32 U. S. App. 485, 68 Fed. 726. The sufficiency of rates with reference to the federal constitution is a judicial question, and one over which federal courts have jurisdiction by reason of its federal nature."

Ex parte Young, 209 U. S. 123 (p. 144).

In support of this declaration of the law, the court cited:

Chicago M. & St. P. R. Co. v. Minnesota, 134 U. S. 418;

Reagan v. Farmers' Loan & T. Co., 154 U. S. 369-399.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649;

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578;
Smyth v. Ames, 169 U. S. 466-522;
Chicago M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172.

In *Ex parte* Young, *supra*, on behalf of the attorney general of Minnesota (against whose institution of suits and prosecutions an injunction had been granted by the Circuit Court), the further objection was made that the suit was in effect against the state, and therefore withdrawn from federal cognizance by the eleventh amendment. After an exhaustive review of the prior cases dealing with that amendment, the court summarized its conclusions therefrom, as follows:

> "The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected, an unconstitutional act, violating the federal constitution, may be enjoined by a federal court of equity from such action."
>
> *Ex parte* Young, *supra*, 209 U. S. p. 155.

The decisions of this court, to the same effect as those above cited, are too numerous, and some of them too recent, to require specific citation.

By these authorities the principle is established beyond dispute, that every act of a state officer or agency, exercising the power of the state, by which any individual may be deprived of property without due process of law, is prohibited by the fourteenth amendment; and the federal courts, when seasonably appealed to, have original jurisdiction to enjoin every such act.

II.

Nature and Scope of the Contention on Which Defendants' Objection to the Jurisdiction in this Case is Based.

We may concede that the contention, that what is forbidden by the constitution of a state cannot be the act of that state, has an appearance of plausibility. Nevertheless we are persuaded that but slight examination is required to dissipate that appearance.

A prime consideration against the soundness of defendants' contention is that ever since the adoption of the fourteenth amendment, the constitutions of some two-thirds of the states of the Union have contained prohibitions against the deprivation of property without due process of law. (See Stimson's Federal and State Constitutions, Sec. 130, p. 169.) And many, if not all, of the cases in which the inferior federal courts (and this court on appeal therefrom) have assumed jurisdiction to enforce the guaranty of

due process in the fourteenth amendment, have arisen in such states. So that, in every one of such cases, if the defendants' contention be sound, this court, as well as the lower courts of the United States, have exercised a jurisdiction which they did not lawfully possess. This circumstance of itself must raise a grave suspicion as to the soundness of defendants' contention: and the more the merits of that contention are examined, the more will its unsoundness become apparent.

The decisions of this court establish that, within the meaning of the fourteenth amendment, every act done by the authority of the state is to be deemed the act of the state itself. That principle will not be disputed; but defendants seek to escape its effect by maintaining that no officer or agent of the state can in any manner be given authority to do that which the constitution of the state forbids. But certainly it must be just as true that no officer or agent of the state can be given authority to do that which the constitution of the United States forbids: for that instrument itself declares that it is "the supreme law of the land," and that "the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." If it were true, then, that within the meaning of the fourteenth amendment, no act forbidden by a state constitu-

tion could be deemed to be the act of the state, so as to give federal courts jurisdiction to restrain or redress it, until the state courts have sanctioned such act, then the same must be held equally true of any act forbidden by the federal constitution: and thus all original jurisdiction of the federal courts to enforce the guarantys of the fourteenth amendment would be destroyed in every state whose constitution contains a like guaranty.

Furthermore, defendants' contention, followed to its logical and necessary conclusion, will not only destroy the original jurisdiction of the inferior federal courts (and the jurisdiction of this court on appeal therefrom), but will also take from this court all jurisdiction to enforce the fourteenth amendment, in a state whose constitution contains similar prohibitions, by reviewing the judgments of the courts of such state. For if a case, in which denial of due process is charged, were brought to this court on appeal or writ of error to the court of such a state, and this court should therein determine that the charge were true, this would only establish, if defendants' contention here is correct, that the act complained of was done in violation of the constitution, and therefore without the authority, of the state, and so was not prohibited by the federal constitution or remediable by this, or any, federal court.

Defendants cannot escape this consequence of

their position by asserting that, in the case supposed, the question of violation of the state constitution would have been finally determined by the courts of the state, and that this court would only be considering the question of the violation of the federal constitution. For obviously this is an immediate and complete admission that the two questions are distinct and different; that the courts of the state may give a different meaning and effect to the state constitution from that given by this court to similar terms in the federal constitution. We submit, indeed, that this is the true conception of the matter, which the judicial history of these guaranties, in the courts of the several states and in this court, would support. So that, in our case, and in every similar case, where a deprivation of property by the act of state officers or agents is alleged (occurring in a state whose constitution prohibits such deprivation), the question, whether the federal constitution has been violated thereby, is entirely distinct and separate from the question whether the state constitution has also been violated; and the complaining party, whether a citizen of that state or of another state, has the right to have such federal question determined in the first instance, as well as finally, by the courts of the nation, which have been instituted for that very purpose.

Certainly, we submit, the defendants whose acts are complained of in such a case, who have,

by their very conduct, asserted their authority under the state to perform such acts, may not compel the complainant, injured by those acts, to go into the state courts for the sole purpose of controverting the authority of the defendants, which they themselves have asserted, and which they would again maintain before such courts.

A contention which leads to such untoward consequences must be erroneous; and the fundamental error of defendants' contention consists, we submit, in the failure to distinguish between the total absence of authority, on the one hand, and the wrongful exercise of authority on the other hand.

But the decisions of this court under the fourteenth Amendment have made clear that it is quite possible for a state to so frame its legislation, and so distribute its governmental powers, as to invest a particular officer or agent with the actual power to do that which the laws, or even the constitution, of the state purport to forbid. An example of such wrongful exercise of authority, familiar to the mind of every lawyer, and which will suffice to point our contention, is found in the judgment of a court, erroneous in point of law, but nevertheless within its authorized jurisdiction. The decisions of this court demonstrate, however, a variety of forms and directions in which such actual powers of the state may be exerted in a manner, or to an end, forbidden by the

laws of the state; and these we shall ask the court to examine at length; for they also establish that every such actual exertion of the power of the state, resulting in a deprivation of property without due process, is forbidden by the federal constitution, and is remediable in the federal courts, although it may also be a violation of state law, and remediable as such in the state courts.

Defendants, it may be, will say that they admit the possibility of such wrongful exercise of authority by state officers and agencies, and that they only contend that redress for such wrongs should be first sought in the courts of the state. This contention is directly refuted by the decisions of this court just mentioned, which we propose later to review in detail, and which we need not burden the court by now repeating.

But here we would point out that this contention, that redress for the wrongful acts of state agencies in exerting the powers of the state must be sought in the state courts, is also wholly repugnant to the general intent of the fourteenth amendment, as that intent has been interpreted by many decisions of this court, in addition to the particular line of cases last referred to. It is also, we contend, opposed to the settled doctrine of this court that a suitor's constitutional choice of forum cannot be denied.

By all these decisions it has been iterated and reiterated that the prohibitions of the fourteenth

amendment comprehend all action of the state whether by its legislative, its executive, or its judicial department. The contention of the defendants is manifestly contrary to that doctrine, for it would make the judicial department of the state the sole organ of state action within the purview of the fourteenth amendment. That contention would change the all embracing words of the amendment: "No *state* shall deprive any person," etc., to read: "No *court* of any state shall deprive any person," etc.

The truth is, we submit, that the decisions of this court furnish a very simple test by which to determine the existence of federal jurisdiction in the class of cases with which we are here concerned. That test lies in the question: Do the facts pleaded show that the complainant has been, or is about to be, deprived of his property without due process of law, *by any exertion of the power of the state?* If this does appear, then federal jurisdiction attaches, regardless of the character of the agency or instrument through which such power of the state is exerted. Nor, under those decisions, does it affect the right or duty of the federal courts to exercise that jurisdiction, that there may exist a concurrent jurisdiction in the state courts, over the same case, because the act complained of also violates state law.

Finally, we shall contend that the guaranty of equal protection of the laws, under the fourteenth

amendment,—to which there is no equivalent in the state constitution,—affords a distinct ground of federal jurisdiction, wholly independent of complainant's claim under the due process guaranty of the federal constitution; so that this case, at least, gives no room whatever for defendants' objection based on the due process clause of the state constitution. Perhaps this point should be first presented, since it renders consideration of all other points unnecessary. But it was not adverted to in the opinion of the court below, and we therefore defer its discussion until the ground on which the opinion proceeds shall have been disposed of.

We shall endeavor, in succeeding portions of our argument, to more fully demonstrate the several propositions of law which we have here asserted, by specific examination of apposite decisions of this court. But in order that the true bearing of those authorities upon the present case may be fully apparent, we first invite the consideration of the court to the significant nature of the governmental action here in question, namely, the prescribing of public utility rates under state legislative authority.

III.

Nature and Effect of Legislative Regulation of Public Utility Rates, in its Bearing on the Jurisdictional Question Here Involved.

There is no question in this case that the charter of the defendant city confers upon its council the power to prescribe the rates to be charged for telephone service within the city. These provisions of the charter are summarized in the allegations of the bill. [Rec., fol. 9.]

The charter also expressly confers upon the city council the general power of making the violation of its ordinances a misdemeanor, punishable by fine and imprisonment. (L. A. City Charter, Sec. 2. Sub. 31; Cal. Stats. 1911, p. 2064.)

The rates adopted by these authorities of the city, in accordance with such charter provisions, are not required to be submitted to or approved by any court or other tribunal, in order to become operative and effectual. There is no dispute, however, that the courts of the state have jurisdiction to pronounce rates so adopted to be in violation of the requirements of the federal constitution, or of the state constitution, if it contained any requirement affecting such rates.

The important question in the present case is the precise legal and practical effect of the passage of a rate ordinance, which is, or is alleged to be, in conflict with constitutional requirements. The answer to that question must be found in a

consideration of the situation which exists in the absence of a legislative or governmental regulation of rates, and of the change which is made in that situation by the enactment of such a regulation.

Until the enactment, by competent authority, of an ordinance or other regulation prescribing the specific rates to be charged, it is clear that the owner of a public utility may refuse to render service to the public, except at such reasonable rates as he may himself establish. If any individual should demand service at a less rate, and seek to enforce that demand by judicial proceedings, by mandamus, for example, the burden would unquestionably be upon him to establish his right to service at a less rate than that demanded by the utility owner; and the latter rate, being, in the case supposed, reasonable in fact, it must be presumed that an attempt to enforce service at a less rate would fail. And substantially the same burden would rest upon one who, after accepting service and paying the established charge therefor, should attempt to recover back some part of the charge as being excessive.

See:

Illinois C. R. Co. v. I. C. Commission, 206 U. S. 441, at pp. 464-5.

In brief, where there has been no government regulation of charges, the public utility owner has

both the legal right and the practical ability to obtain the full amount of reasonable compensation for services rendered. Neither in law nor in fact is there any compulsion upon him to render service for any less compensation. The right to receive such reasonable compensation is undoubtedly to be regarded as a right of property, under the settled decisions of this court holding the deprivation of the right to be forbidden by the fourteenth amendment. So regarding the right, the owner of the utility may be aptly said to be in possession of such property.

Now, compare with this the situation which arises where a rate regulation has been adopted, by an agency of the state invested with appropriate power, and that regulation prescribes a rate less than what the utility owner is justly entitled to receive. In such case, even if no penalties of fine or imprisonment are imposed for violation of the rate, the owner is no longer free to charge, or practically able to collect, reasonable compensation for services rendered, such compensation being beyond the limit fixed by the confiscatory regulation.

For if the owner should demand such higher but reasonable compensation, and refuse to render service without its payment, then any party demanding service at the prescribed rate could enforce that demand by appropriate judicial action, such as mandamus. In any such action the

validity of the rate so fixed by competent public authority would be presumed. Such *prima facie* validity of the rate prescribed is a consequence inherent in the grant of power to prescribe rates. To say that a designated body has the power to prescribe rates, and yet deny that the rate prescribed by that body is *prima facie* the legal rate and binding as such, would be a self-contradiction. As this court has said:

> "An act of the legislature, fixing rates either for passengers or freight, is to be regarded as *prima facie* valid, and the onus rests upon the company to prove its assertion to the contrary."
>
> *Ex parte* Young, 209 U. S. 123 (p. 165).

Hence in case of such an action as above supposed, the burden would unquestionably be upon the utility owner to establish the unreasonableness of the rate prescribed by public authority; failing in that defense, judgment would be granted as a matter of course, enforcing service at the rate so prescribed.

And so, if the utility owner should render the service without payment in advance, and thereafter seek to recover such higher compensation, the burden would again be upon him to overcome the *prima facie* effect and validity of the rate prescribed, and to establish his right to any greater rate.

Again, if we assume that the utility owner

might, by refusing to render service at the prescribed rate, be able to exact higher compensation in advance, he would still not have escaped from the effect of the public regulation. For, under the modern doctrine, such refusal to render a public utility service—at least where the circumstances made it a business necessity with the party demanding it—would amount to such duress as would make the payment involuntary, and subject to recovery by suit; in which suit, again, the validity of the prescribed rate would be presumed against the utility owner.

Robertson v. Frank Bros., 132 U. S. 17, and cases cited;

Burke v. Gould, 105 Cal. 281;

Chicago v. N. W. Mut. Life Ins. Co., 218 Ill. 40, 75 N. E. 803, and cases cited.

Thus, at every turn, the *prima facie* validity of a rate prescribed by an authorized agency of the state confronts the utility owner and places upon him the burden of judicially establishing the unreasonableness and invalidity of such rate, as a condition precedent to exercising his constitutional right to charge and receive reasonable compensation for services rendered. And hence, again regarding this right as property, it is clear that the owner has been deprived of its possession. The consideration that he may be able to recover it by judicial proceedings no more alters

the fact of his deprivation, than does the like ability to recover the possession of land by an action of ejectment lessen the fact of deprivation to the owner who has been ousted of such possession.

If the language which we have thus used to describe the situation created by a confiscatory rate regulation be criticised as figurative, our answer is that the wrongful restraint of the right to reasonable compensation, which that situation involves in its legal effect, is real and substantial, and is an actual and practical deprivation of the right itself.

There are many decisions of this court, some of them we have already cited, holding that a state law or regulation prescribing confiscatory rates for a public utility is a deprivation of property without due process of law. It is a necessary deduction from those cases, we submit, that the obnoxious character of such law does not depend upon the means which the state may take to enforce submission to it. The prohibited deprivation is accomplished if any substantial degree of coercion is exerted, under authority of the state, to secure conformity to the rates prescribed.

Now it is certainly a fact, and one of which this court will take judicial notice, that the task of establishing, by competent and satisfactory evidence, the unreasonable character of a rate prescribed by a public authority is always one of

great difficulty, except in the unusual (although not unprecedented) case of a prescribed rate which is insufficient even to defray the necessary, immediate expense of rendering the service. In every other case, where the factors of extent and value of the property employed in the service, the actual or probable return from the rate prescribed if enforced, and the portion of such return which must be expended for operation and maintenance, or set aside to meet depreciation, must all be established by evidence, such suit is difficult to maintain despite its intrinsic merit, and a very heavy pecuniary burden, and consequent loss, is imposed upon the owner of the utility in vindicating his constitutional rights,—ordinarily he cannot recoup even if his suit be successful. See the observations of this court (to which we will again refer) in

Ex parte Young, *supra*, 209 U. S. 123 (pp. 148, 164).

It is, of course, possible that no such attempt as we have supposed, to obtain the benefit of the prescribed rates, would be made by individuals desiring service from the utility affected. But it cannot be presumed that such would be the case, nor is it at all probable, and it is expressly negatived, in the case at bar, by the allegations of complainant's bill. [Rec., par. XIX, p. 16.] The burden which would be placed upon the

utility owner in an action of either of the classes suggested would be so great that the threat of such an action would be enough of itself to coerce compliance with the demands of any single individual. Indeed, the utility owner could much better afford to thus compromise with a great number of individual demands rather than attempt to defend one such suit on the ground of the confiscatory character of the rate prescribed. The only escape, therefore, from such demands (and from actions to enforce them, if not yielded to) would be by an equitable suit brought by the utility owner himself against all who might threaten such proceedings,—and others in like situation,—to enjoin this multiplicity of actions; which suit, of course, could only be maintained by establishing therein the confiscatory character of the prescribed rate.

Hence it is evident, as a practical matter of fact, that the prescribing of a confiscatory rate, by a body invested with the legislative authority to fix rates, would of itself operate to deprive the utility owner affected, of the right of property secured to him under the fourteenth amendment, —the right to receive reasonable compensation for service rendered to the public—by preventing him from exercising or enjoying that right except at the expense of first judicially establishing the confiscatory character of the prescribed rate.

It is also thus apparent that every rate regula-

tion, prescribed by an agency to which legislative power in that regard has been delegated, does by its mere enactment carry a very substantial and effective sanction in the *prima facie* validity which necessarily attaches to rates so prescribed, even though they be in fact confiscatory.

In the case in hand, however, the state, acting through its duly authorized agency, has not stopped with imposing the burden of establishing the invalidity of a confiscatory rate, as means of enforcing it. The violation of this rate ordinance has been made a misdemeanor punishable by fine not exceeding two hundred dollars, and imprisonment not exceeding one hundred days, for each offense. [Ordinance, Sec. 7; Rec., fol. 51.] Upon reading section 2 of the ordinance [Rec., fol. 48], it will be seen that these penalties apply not only to the complainant corporation itself, but to every employee and agent of the complainant, who shall "charge, demand, collect or receive any rate in excess of the rate fixed by this ordinance."

The number of individual subscribers to complainant's telephone system, as alleged in the bill, is upwards of thirty thousand. [Rec., par. XX, fol. 24.] The aggregate fines which might be imposed upon the complainant corporation itself for charging higher rates *for a single month* would therefore amount to more than *six million dollars*, or a sum approximating *the total value of complainant's plant*. [Rec. fol. 13.] And

this amount must be multiplied by the total number of individual officers and agents of the complainant concerned in the collection, in order to ascertain the total pecuniary loss which the city has threatened to occasion as the penalty for disregarding the rates prescribed. And over and beyond this pecuniary loss is the threat of imprisonment for one hundred days for each of these individual agents of the complainant, participating in any violation of the ordinance.

It is true, of course, that we have stated the maximum penalties which might be imposed for the violation of this ordinance—though only for one month's violation, however—and it is also true that complainant would be entitled to make the defense against each prosecution for alleged violation of the ordinance, that the rates prescribed thereby were confiscatory and the ordinance therefore void.

But the establishment of this defense, as already suggested, imposes of itself a great pecuniary burden and loss upon complainant, even in a single case, and there would be nothing to prevent numerous prosecutions being carried on at the same time. A disregard of the ordinance for a single month would involve more than thirty thousand violations of its provisions, simultaneously occurring, and therefore liable to be simultaneously prosecuted. It is true that the prosecuting officers and the criminal courts might, as

a matter of grace, let the question of the confiscatory character of the rates be tried out in one case as a test; but they would be liberally exercising their discretion in so doing, and could not be compelled to take this course except through such an injunction as is sought by complainant's bill.

Moreover, in determining the coercive effect of such a rate regulation, and of the penalties, if any, prescribed for its violation, there must be considered the uncertainty of judicially establishing the confiscatory character of rates legislatively prescribed.

For this court has repeatedly announced and adhered to a very exacting rule regarding the degree of proof required to establish the confiscatory character of a public utility rate, established under legislative authority. And it has more than once reversed the decree of a trial court, based upon the finding of such confiscatory character, upon the ground that the evidence left some doubt as to the actual effect of the questioned rate upon the net returns of the business affected, and that such actual effect must be determined by a trial of the rate before its enforcement would be enjoined.

Knoxville v. Water Co., 212 U. S. 1;
Willcox v. Gas Co., 212 U. S. 19;
Louisville v. Telephone Co. (decided June 7, 1912), 225 U. S. ....

So far as our observation extends, the courts of the several states have confined the granting of judicial relief against legislative rates within bounds quite as narrow. Certainly this is true of the courts of California. (See, e. g., Contra Costa Water Co. v. Oakland, 159 Cal. 323.) It would be idle for us, or anyone, now to quarrel with the rule thus adopted, or to question the sufficiency of the grounds on which it is rested, and we do not propose to do so. But the consideration which we earnestly urge upon the attention of the court is that so long as judicial relief is thus restricted to cases in which the evidence leaves no substantial doubt of the confiscatory effect of the prescribed rates, it must be difficult, and often impossible, for the utility owner to establish the fact of confiscatory character *although it exists*. For it ought to be, and in the long run it will probably prove to be, the exception when a public utility commission or similar body prescribes a rate so low that its confiscatory character can readily be convincingly demonstrated. If these bodies are not actuated by any higher motive, they will at least be constrained by the fear of judicial interference to prescribe rates high enough to be within the zone of judicial doubt.

Let us repeat that we are not criticising this rule of the courts as to degree of proof required, or denying its wisdom or necessity. We are only

asking the court to consider the inevitable consequences of applying such a rule to cases presenting the difficult and doubtful questions of fact on which this class of cases necessarily depend.

There is, in the first place, an inherent uncertainty as to the effect of any given rate upon the returns of the business affected, arising from the possibility of increased patronage just because of lower rates. There are further, and likewise inherent, difficulties of establishing each of the other necessary elements involved in the assertion that a given rate is confiscatory, viz., the value of the property employed in rendering the service, the amount of necessary expenses of operation and maintenance, and the amount of average depreciation due to age, obsolescence and interference by public authorities. Each of these three elements depends in very large part on questions of opinion on which equally competent witnesses will disagree, even when not affected by bias for or against the parties to the suit.

And these matters are not only largely dependent on opinions and estimates, but also in part upon evidence of a nature difficult to procure and properly present. Records extending over a long series of years are usually involved, likely to be inadequate if not inaccurate, even if available at all. And in a plant of any size, there is necessarily a vast amount of complex detail in proving the several elements of which it is composed. The

difficulty of preparing this great mass of evidence, dealing with innumerable and, individually considered, petty details, and the further difficulty of so marshalling that evidence as to make a just and adequate impression upon the judicial mind which must pass on its sufficiency, will surely be conceded, Indeed, this court will only need to recur to the numerous instances in which it has been called upon to review the transcript of evidence produced in such cases to fully appreciate both the truth and significance of the facts we have endeavored to state.

For the coercive effect of these considerations, of the great difficulty and uncertainty attending this class of litigation, must be obvious. Their significance will be emphasized, too, by reference to the several instances in which this court has been obliged to reverse the findings of trial courts which had held rates to be confiscatory.

With these precedents before the mind of the officers and counsel of public service corporations confronted with the problem of meeting a confiscatory rate regulation, how can they have any confidence of ultimate success in attacking such rate, even though it appears clear to them that it will not afford a just return? Are they not bound to consider that what may seem perfectly clear to them, it may be impossible to make clear to others? And if they are wise and prudent, will they not be thus deterred from disregarding such

a rate regulation, by demanding reasonable compensation for services rendered, until the invalidity of the rate prescribed has been judicially established?

The difficulty of establishing the defense of confiscatory character of the rates involved, and the uncertainty of result in such litigation, were recognized by this court in *Ex parte* Young, *supra*. These matters were there being considered with reference to the question whether the imposing of penalties of fine and imprisonment before judicial ascertainment of the reasonableness of the rate amounted to a denial of equal protection of the laws, and also as to whether, in such a case, an injunction in equity against the enforcement of the penal provisions of the law was an appropriate remedy. The first of these questions is one which must also arise in the case at bar, and requires, and will receive, separate examination. But the observations of this court in the case last referred to, are equally pertinent to the present questions, and submit we would emphasize the following brief excerpts therefrom:

> "It would be difficult, if not impossible, for the company to obtain officers, agents, or employees, willing to carry on its affairs, except in obedience to the act and orders in question. The company itself would also, in case of disobedience, be liable to the immense fines provided in violating orders of the commission. The company, in order to

test the validity of the acts, must find some agent or employee willing to disobey them at the risk stated. The necessary effect and result of such legislation must be to preclude a resort to the court, either state or federal, for the purpose of testing its validity. The officers and employees could not be expected to disobey any of the provisions of the acts or orders at the risk of such fines and penalties being imposed upon them, in case the court should decide that the law was valid. * * *

"If, however, one should be found, and the prosecutor should elect to proceed against him, the defense that the act was invalid because the rates established by it were too low, would require a long and difficult examination of quite complicated facts, upon which the validity of the act depended. Such investigation it would be almost impossible to make before a jury, as such body could not intelligibly pass upon the matter. * * *

"To await proceedings against the company in a state court, grounded upon a disobedience of the act, and then, if necessary, obtain a review in this court, by writ of error to the highest state court, would place the company in peril of large loss, and its agents in great risk of fine and imprisonment, if it should be finally determined that the act was valid. *This risk the company ought not be required to take.*"

Ex parte Young, 209 U. S. pp. 145, 164, 165.

It is true that the penalties under consideration in that case were heavier, for a single offense, than those prescribed by the ordinance here in-

volved; but that does not affect the principle which the court stated. Certainly the penalties of the ordinance here in question are severe enough to invoke the application of that doctrine. As we have pointed out, the fines which might be visited upon the corporation itself, for a single month's disregard of the ordinance rates, would amount to nearly the total value of its physical plant,—upwards of six million dollars. And this is in addition to all the penalties of both imprisonment and fine which might be inflicted at the same time upon the corporation's officers and agents.

The necessary consequence of such a law or ordinance, is that the utility owner affected thereby does not dare, he cannot afford, to risk the penal consequences of violating the rate regulation, although he is himself fully satisfied of its confiscatory character. His only safe course is to seek the judgment of a competent court, establishing the fact of such confiscatory character, and enjoining further enforcement of the regulation; and in the meantime he must submit and conform to the regulation, confiscatory though it be. Thus it is obvious that from the moment that such a regulation so sanctioned takes effect, in the legislative sense, the utility owner is deprived of his property, his right to receive reasonable compensation—and in fact of a part of the compensation itself; and this deprivation will

continue until he obtains such a protective judgment of a competent court.

How can it be doubted that a suit seeking such relief is one arising under the constitution of the United States, and therefore within the original jurisdiction of the federal courts? The situation which makes such relief imperative is the direct and necessary result of the enacting of the rate regulation by a body having jurisdiction, i. e., invested with the authority of the state to that end. No sanction of any court, and no action whatever of any other tribunal of the state, is required to make the rate regulation thus effective, or to make it accomplish such deprivation of property. And all of this coercive force and effect of such an ordinance, it is to be observed, is solely due to the fact that the body which enacts it has been invested by the state with legislative authority to prescribe rates and denounce penalties; and is not in any degree lessened by the state's constitutional guaranty, in terms, of due process of law.

That such a case is necessarily one of federal cognizance, is fully established, we submit by the decisions of this court which we shall now ask it to examine.

IV.

Under the Decisions of this Court Construing and Enforcing the Fourteenth Amendment, Federal Courts have Original Jurisdiction to Restrain and Redress Acts of State Officers and Agencies Forbidden by that Amendment, Notwithstanding Such Acts are also Contrary to the Law of the State.

Before proceeding to that examination, however, we must again point out that *this case* presents an entirely independent federal question and ground of jurisdiction, arising under the equal protection clause of the fourteenth amendment, because of the obnoxious character of the penal provisions of this ordinance,—the discussion of which point will follow our argument on the merits of defendants' contention, in any case.

A construction of the fourteenth amendment, which we submit is controlling in the present controversy, was adopted in a group of cases which arose and were decided not long after its adoption. Those cases called for a construction not only of the fourteenth amendment itself, but also of legislation which congress had enacted with a view to making more effective the constitutional prohibitions.

Most of those cases turned on the right of a person of the colored race, accused of crime, to be indicted by a grand jury and tried by a petit jury in the selection of which there has been no

discrimination on account of race. That right this court held to be secured to such persons by the guaranty of equal protection of the laws; but further, and somewhat different, questions were presented by the various cases, touching the manner of enforcing that right.

In one of the cases above referred to, it appeared that the statutes of the state of West Virginia confined the right of jury service to persons of the white race. In that case the decision of this court was that a person of the negro race, indicted for crime under the laws of such state, was entitled to have his case removed to the Circuit Court of the United States for trial, in accordance with the provisions of section 641 of the Revised Statutes.

Strauder v. West Virginia, 100 U. S. 303.

In the second of this group of cases, a petition for a like removal, under the same statute, had been made by a colored person indicted for crime under the laws of the state of Virginia. This petition alleged in substance that the laws of the state qualified colored persons to serve on juries equally with white persons, but that colored persons had never in fact been summoned on juries; that the petitioner had demanded that some such persons should be summoned upon the jury empaneled to try his case and that the demand had been refused; and that by reason of the prejudice

against his race existing in the community he could not have a fair trial before a jury composed wholly of white persons. The decision of this court was that such petition showed no ground for removal under that act (R. S., Sec. 641). Discussing that question the court said:

> "The provisions of the fourteenth amendment of the constitution we have quoted all have reference to state action exclusively, and not to any action of private individuals.
> * * *
>
> "It is doubtless true that a state may act through different agencies,—either by its legislative, its executive, or its judicial authorities; and the prohibitions of the amendment extend to all action of the state denying equal protection of the laws, whether it be action by one of these agencies or by another. Congress, by virtue of the fifth section of the fourteenth amendment, may enforce the prohibitions whenever they are disregarded by either the legislative, the executive, or the judicial department of the state. The mode of enforcement is left to its discretion. It may secure the right, that is, enforce its recognition, by removing the case from a state court in which it is denied, into a federal court where it will be acknowledged. Of this there can be no reasonable doubt. Removal of cases from state courts into courts of the United States has been an acknowledged mode of protecting rights ever since the foundation of the government. Its constitutionality has never been seriously doubted."

Virginia v. Rives, 100 U. S. 313 (318).

It was then observed that congress could undoubtedly have provided for the removal into the federal courts of every case in which the rights secured by the amendment might be denied, but that clearly it had not done so by the provisions of R. S., Sec. 641, as to which the court said: "The constitutional amendment is broader than the provisions of that section."

And after a consideration of the terms of the section the conclusion was reached that the denial or inability to enforce rights in the judicial tribunals of the state, of which that statute speaks, "is primarily, if not exclusively, a denial of such rights, or an inability to enforce them resulting from the constitution or laws of the state rather than a denial first made manifest at the trial of the case."

For, it was held, as the statute only provided for removal before trial, it could not have intended to authorize such a removal on account of acts of merely administrative or ministerial officers, contrary to state law, and which could be, and it must be presumed would be, redressed by the court when properly brought to its attention at the trial. But it was not held that such a ministerial act could not be an act of the state, and prohibited by the fourteenth amendment. On the contrary it was said:

> "If, as was alleged in the argument, though it does not appear in the petition or

record, the officer to whom was intrusted the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, disregarding the statute of the state, confined his selection to white persons, and refused to select any persons of the colored race, solely because of their color, his action was a gross violation of the spirit of the state's laws, as well as of the act of congress of March 1, 1875, which prohibits and punishes such discrimination. He made himself liable to punishment at the instance of the state and under the laws of the United States. *In one sense, indeed, his act was the act of the state, and was prohibited by the constitutional amendment.* But inasmuch as it was a criminal misuse of the state law, it cannot be said to have been such a 'denial or inability to enforce in the judicial tribunals of the state' the rights of colored men as is contemplated by the removal act."

Virginia v. Rives, 100 U. S. 313 (pp. 318-321).

The third of this group of cases arose under a different act of congress, namely, the Act of March 1, 1875 (St. L. Part 3, 336). That act made it a felony for any officer, or other person charged with the selection of jurors, to exclude or fail to summon any person "on account of race, color or previous condition of servitude." The petitioner in that case was held in custody on an indictment under the statute and sought release by writ of *habeas corpus* from this court on

the ground that such legislation was beyond the power of congress under the fourteenth amendment. But this court sustained the validity of the act, discussing at some length the purpose of the fourteenth amendment and calling attention to its express provision for legislation by congress in enforcement thereof. Conceding that "the prohibitions of the fourteenth amendment are addressed to the states," the opinion of this court further said (speaking of those prohibitions):

> "They have reference to actions of the political body denominated a state, by whatever instruments or in whatever modes that action may be taken. A state acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the state, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state. This must be so, or the constitutional prohibition has no meaning. Then the state has clothed one of its agents with power to annul or to evade it."

The further objection was made to the validity of the act as applied to the case then before the

court that "congress cannot punish a state judge for his official acts," and as the accused was such an officer, his selection of jurors was claimed to be a judicial act. This court emphatically denied the claim that such act was of a judicial nature, declaring it to be merely ministerial, whether performed by a sheriff or a judge. But it further said:

> "But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direct violation of the spirit of the state statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion. It is idle, therefore, to say that the act of congress is unconstitutional because it inflicts penalties upon state judges for their judicial action. It does no such thing."
>
> *Ex parte* Virginia, 100 U. S. 339 (pp. 346, 348).

We ask particular attention to the portion of the opinion in *Ex parte* Virginia last cited because it clearly shows that the act of the state officer in question was not regarded as the judgment of a court. On the contrary, it was declared to be merely ministerial; and it must have been regarded by this court as capable of being remedied by suitable objection being made at the trial,

as had just been pointed out in Virginia v. Rives, *supra* (the opinion in which was delivered, for this court, by the same learned justice). But this court held, in effect, that it was not required that application for such relief should be made to the state courts, and their sanction of the act obtained, before it could be regarded as an act of the state, prohibited by the fourteenth amendment, and therefore within the jurisdiction of congress to make punishable as a criminal offense under the laws of the United States. The decision that such an act was so punishable by act of congress necessarily implied, what this court indeed expressly affirmed, that such an act of a state officer, although also forbidden by the state law, and though no redress therefor had been sought from the state courts, was the act of the state within the fourteenth amendment. If such an act is within the jurisdiction of the federal legislature to punish, as forbidden by that amendment, it must equally be within the jurisdiction of the federal courts to restrain or redress, as being so forbidden.

The language first above quoted from the decision in *Ex parte* Virginia, declaring the comprehensive scope of the fourteenth amendment, has been accepted as a true definition thereof in all the later decisions of this court and frequently quoted as such. The further proposition, which results from the language last quoted, namely,

that the prohibitions of the fourteenth amendment extend to every act of a state officer done in his capacity as such, notwithstanding it may be contrary to the law of the state, was equally involved in the case, as we have pointed out, and has likewise been accepted unquestioningly in subsequent decisions. Its force is strikingly emphasized by the comparison of this decision, which we have suggested, with the ruling in Virginia v. Rives, *supra,* which arose under the same state statutes and constitutional provisions. In the last named case it was held, as shown, that the acts of officers charged with the selection of jurors, although denying a right secured by the fourteenth amendment, did not afford cause for removal of a case into the federal courts under R. S., Sec. 641. It was not there held, however, that such acts were not within the prohibition of the fourteenth amendment: on the contrary, it was explicitly affirmed that "the constitutional amendment is broader than the provisions of the statute"; and it was said that the act of the administrative officer there complained of, although "a criminal misuse" of the state law, was "the act of the state and was prohibited by the constitutional amendment."

But it was further held that such act was not within *the statute* because *that* applied to acts of ministerial officers only when done in obedience to the law of the state. *Ex parte* Virginia holds,

on the other hand (although conceding this decision in Virginia v. Rives), that such ministerial acts of state officers are obnoxious to the fourteenth amendment even though done in disobedience to state law.

This proposition that the act of a state officer, although a violation of his duty under the law of the state, may nevertheless be the act of the state within the purview of the fourteenth amendment, was affirmed by the decision of this court in another similar case arising under the fourteenth amendment and R. S., Sec. 641, and decided at the next term after the cases we have above alluded to. We refer to *Neal v. Delaware*, where a petition for removal under this statute had been made on the ground of discrimination against the colored race in the selection of grand and petit jurors and denied by the state court, as well as motions to quash the indictment and the jury panels on the same ground. It appeared that jury service in Delaware under the constitution and laws of that state as interpreted and enforced by its courts, was open to persons of the negro race equally with whites. This court accordingly decided that the petition for removal was rightly denied under the rule laid down in Virginia v. Rives. But as to the motions to quash the indictment and jury panels because of the exclusion of colored persons from such juries, this court said:

"It was, we think, under all the circumstances, a violent presumption which the state court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judgment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the state; and the refusal of the state court to redress the wrong by them committed was a denial of a right secured to the prisoner by the constitution and laws of the United States. Speaking by Mr. Justice Strong, in *Ex parte Virginia*, we said, and now repeat, that 'a state acts by its legislative, its executive, or its judicial authorities. It can act in no other way.' (And the court then repeat the whole passage which we have above quoted from *Ex parte* Virginia, concluding):

"This must be so, or the constitutional prohibition has no meaning."

Neal v. Delaware, 103 U. S. 370 (397).

We emphasize this recital of the definition of the scope of the fourteenth amendment laid down in *Ex parte* Virginia, because its re-statement in connection with the facts in Neal v. Delaware exemplifies its full significance as applied to the acts of state officers which are beyond their lawful authority, but nevertheless within the actual power which the state has conferred upon them. For as we have stated, it appeared in that case that the laws of Delaware did not sanction such

discrimination in the selection of jurors as this court held was shown on the part of the summoning officers,—whose act nevertheless was declared to be the act of the state, precisely as it was in *Ex parte* Virginia, *supra.*

Neal v. Delaware, *supra,* was cited and followed in a comparatively recent case presenting almost identical facts, wherein the court stated the rule of decision thus:

> "Whenever by any action of a state, whether through its legislature, through its courts or through its executive or administrative officers, all persons of the African race are excluded solely because of their race or color from serving as grand jurors in the criminal prosecution of a person of the African race, the equal protection of the laws is denied to him contrary to the fourteenth amendment of the constitution of the United States."
>
> Carter v. Texas, 177 U. S. 442 (447).

This construction of the guaranties of the fourteenth amendment in respect to the selection of jurors has been approved in a number of other cases in which, however, the particular relief sought was denied on grounds similar to those which prevailed in Virginia v. Rives. In this category are the following relatively late cases:

Gibson v. Mississippi, 162 U. S. 579;
Williams v. Mississippi, 170 U. S. 213;
Tarrance v. Florida, 188 U. S. 519;
Martin v. Texas, 200 U. S. 316.

In the cases of Yick Wo v. Hopkins and Wo Lee v. Hopkins, the principle for which we are contending was given another application, and a new form of statement repeatedly approved in subsequent decisions. In one of the two cases mentioned (which were disposed of by this court in one opinion) a writ of *habeas corpus* was sought from the Circuit Court of the United States on behalf of a Chinaman convicted of violation of an ordinance of the city of San Francisco, and this court held that the writ should have been allowed. The ordinance purported to regulate the maintenance of laundries in that city, and among other things prohibited laundries in wooden buildings without a permit from the board of supervisors. It was alleged that in the administration of this ordinance such permits were uniformly denied to applicants of the Chinese race and almost universally granted to applicants of any other race. This court expressed the opinion that the vesting of such arbitrary power as appeared to be conferred by this ordinance upon a local legislative or administrative body was contrary to the fundamental rights guaranteed by the fourteenth amendment and rendered the ordinance void. But it further said:

> "This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In

the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the state itself, with a mind so unequal and oppressive as to amount to a practical denial by the state of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the fourteenth amendment to the constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. This principle of interpretation has been sanctioned by this court in Henderson v. Mayor of New York, 92 U. S. 259; Chy Lung v. Freeman, 92 U. S. 275; *Ex parte* Virginia, 100 U. S. 339; Neal v. Delaware, 103 U. S. 370; and Soon Hing v. Crowley, 113 U. S. 703."

Yick Wo v. Hopkins, 118 U. S. 356 (pp. 373-374).

The specific application which was thus given to this interpretation of the fourteenth amendment in Yick Wo v. Hopkins, *supra*, has likewise been approved in recent decisions of this court. Thus in the case of Dobbins v. Los Angeles, injunction was sought against the enforcement of an ordinance restricting the territory within which gas works might be erected and maintained, circumstances being alleged tending to show that the real purpose of the ordinance was not a legitimate exercise of the police power but interference with the enterprise of plaintiff, to the consequent advantage of a rival enterprise. In holding that the enforcement of the ordinance against the plaintiff would be an abuse of the police power vested in the municipality this court said:

> "Whether, when it appears that the facts would authorize the exercise of the power, the courts will restrain its exercise because of alleged unlawful motives inducing the passage of an ordinance, is not a question necessary to be determined in this case; but where the facts as to the situation and conditions are such as to establish the exercise of the police power in such manner as to oppress or discriminate against a class or an individual the courts may consider and give weight to such purpose in considering the validity of the ordinance. This court in the case of Yick Wo v. Hopkins, 118 U. S. 356, held that although an ordinance might be lawful upon its face and apparently fair in its terms, yet if it was enforced in such a

manner as to work a discrimination against a part of the community for no lawful reason, such exercise of power would be invalidated by the courts."

Dobbins v. Los Angeles, 195 U. S. 223 (p. 240).

Yick Wo v. Hopkins was again cited and its principle of decision approved, although no occasion was found for applying that principle, in

Bailey v. Alabama, 219 U. S. 219, p. 231.

In the same line of decision with the cases we have here cited is Scott v. McNeal, decided by this court at October term, 1893, on writ of error to the Supreme Court of the state of Washington. The action was ejectment to recover land which had been sold by an administrator, under order of a probate court, in proceedings taken upon the estate of the plaintiff as a (supposed) deceased person, he having been absent from the state and not heard from for a period of more than seven years when such probate proceedings were instituted. The judgment of the Supreme Court of Washington sustained the validity of such sale, holding in effect that such probate proceedings are conclusive upon all persons interested in the estate, including the supposed decedent, notwithstanding the latter was in fact still living. This court reversed that judgment on the ground that its effect was to deprive the plaintiff of his prop-

erty without due process of law. And it was held that the local statute providing for probate proceedings was not intended to confer jurisdiction on the probate court except in the case of a person actually deceased and that the notice for which it provided was not notice to the supposed decedent but only to the persons whose interests in the estate depended on his death. In this regard it was held that the state court had erred in its construction of the local statutes; and to this feature of the decision of this court we desire to call particular attention. In the opinion of this court in that case it was said (referring to this *construction* of the local statute):

> "After giving to the opinion of the Supreme Court of the state the respectful consideration to which it is entitled, we are unable to concur in its conclusion, or in the reasons on which it is founded.
>
> "The fourteenth article of amendment of the constitution of the United States, after other provisions which do not touch this case, ordains, 'nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. Virginia v. Rives, 100 U. S. 313, 318, 319; *Ex parte* Virginia, 100 U. S. 339, 346; Neal v. Delaware, 103 U. S. 370, 397."

Scott v. McNeal, 154 U. S. 34 (45).

That we are justified in attributing particular significance to this feature of the decision in Scott v. McNeal is evidenced by the citation thereof in Chicago etc. R. Co. v. Chicago, where the effect of a decision of the highest court of a state in direct opposition to the provisions of the state constitution was distinctly involved. In that case it was claimed that the plaintiff in error, a railroad corporation, had been deprived of its property without due process of law in that it had been awarded only nominal damages for an easement taken for a public highway across the railroad right-of-way, under a judgment which had been affirmed by the state Supreme Court. The question whether the guaranty of due process in the fourteenth amendment requires just compensation to be made for property to be taken for public use, after elaborate consideration, was decided by this court in favor of that contention. But preliminary to that inquiry this court pertinently observed:

> "It is not contended, as it could not be, that the constitution of Illinois deprives the railroad company of any right secured by the 14th amendment. For the state constitution not only declares that no person shall be deprived of his property without due process of law, but that private property shall not be taken or damaged for public use without just compensation. But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state, to its

legislative, executive, and judicial authorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it.' *Ex parte* Virginia, 100 U. S. 339, 346, 347; Neal v. Delaware, 103 U. S. 370; Yick Wo v. Hopkins, 118 U. S. 356; Gibson v. Mississippi, 162 U. S. 579. These principles were enforced in the recent case of Scott v. McNeal, 154 U. S. 34, in which it was held that the prohibitions of the 14th amendment extended to 'all acts of the state, whether through its legislative, its executive, or its judicial authorities'; and, consequently, it was held that a judgment of the highest court of a state, by which a purchaser at an administration sale, under an order of a probate court, of land belonging to a living person who had not been notified of the proceedings, deprived him of his property without due process of law contrary to the 14th amendment."

Chicago etc. R. Co. v. Chicago, 166 U. S. 226 (pp. 233, 234).

Counsel for appellees, we apprehend, may take exception to our citation of the two cases last mentioned, as involving only the judgment of the highest court of a state. That objection is completely answered by the reliance expressly placed

upon the latter of these two cases by the decision of this court in Raymond v. Chicago Traction Co., to which we shall next refer. Even apart from its refutation by that decision, we submit that the objection is of no merit.

The judicial department of a state cannot be regarded as in any sense the exclusive organ of state action. It is only one of several independent and co-ordinate departments; and the legislative and executive departments are the more obvious, if not the more often employed, instruments of state action. That it was merely as one of these several equally responsible agencies of the state that the judicial department was regarded in the cases cited is evident from the terms in which the state's accountability for their action under the fourteenth amendment was there stated. In both decisions the language is, that the prohibitions of that amendment embrace all acts of a state's "legislative, executive and judicial authorities." It is true, of course, that the highest court of the state is to be regarded as the final interpreter of its constitution and laws; but it was clearly not in that character that its action was presented for the judgment of this court in either of the cases in question. It could not have been so. For in Scott v. McNeal, as we have seen, this court plainly declared that the judgment of the Supreme Court of Washington had placed an erroneous construction upon the statute of the state. And

in Chicago etc. R. Co. v. Chicago, above cited, the jurisdiction of this court to inquire and determine whether the judgment of a state court was an act of the state contrary to the fourteenth amendment was asserted notwithstanding it was recognized that if the act was of that character it was equally contrary to the constitution of the state. If undeniable violation of the state constitution by an act of its judicial officers,—a judgment of its highest court,—does not take away its character as an act of the state, neither can such violation by the act of any other officer of the state deprive it of the like character, if it be an act which derives its force or effect from the authority with which the state has invested such officer.

> "This must be so or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agencies with power to annul and evade it.'"
>
> Chicago etc. R. Co. v. Chicago, *supra*, (166 U. S. at p. 234).

Raymond v. Chicago Traction Co., above referred to, is in no way distinguishable in its essential facts from the case at bar. It was brought in a circuit court of the United States to enjoin proceedings for the collection of taxes assessed against the complainant railway corporation by the state board of equalization. The material facts in the case were these: The state board of equalization was charged with the duty of assess-

ing for taxation the capital stock of all corporations of certain classes. It made such an assessment of the capital stock of the complainant and hundreds of other corporations—for aught that appeared, all of the corporations subject to its jurisdiction. On this assessment taxes were levied and duly paid by the complainant. Subsequently, however, the courts of the state granted a writ of mandamus requiring the board to make a new assessment for the same year of the capital stock of the complainant and of some twenty-two other corporations, on the ground that the first assessment was based on a fraudulent undervaluation. The re-assessments so required were made and were some twenty times as high as the original assessments. Such re-assessment, however was ordered and was made only on the twenty-three corporations, including the complainant, named in the writ of mandamus; and it left unaffected all the assessments of the hundreds of other corporations in the state subject, under the law, to be assessed in the same manner. The action of the board of equalization in the making of assessments was final, in the sense that the law provided for no appeal, or other direct review of its proceedings by any court or other tribunal. The ground on which the mandamus was granted was that the original assessments were so grossly erroneous as to be, in law, no assessment at all. (See statement of case, 207

U. S. at page 24.) This, if true of the assessments named in the writ, was equally true of the assessments of all other corporations of the same class. Hence the restriction of the mandamus proceedings to certain named corporations was no justification for the failure of the board to apply the same principle and procedure to all corporations in the same class, so that the discrimination which resulted was, at least in legal contemplation, wholly the act of the board, not of the courts granting the mandamus.

Discussing the merits of the claim, made upon these facts, that the action of the state board of equalization in making the assessment under consideration was the action of the state and if carried out would violate the provisions of the fourteenth amendment, this court said:

> "The state board of equalization is one of the instrumentalities provided by the state for the purpose of raising the public revenue by way of taxation. In regard to corporations of the class of which the appellee and the other corporations involved here are members, it is the duty of that board to make an original assessment upon them. From the decision of the board in making such assessment no appeal is provided for, and each decision is therefore conclusive, except as proceedings for relief may thereafter be taken in the courts. As to the assessments of local assessing bodies, the board is one of review, but its decisions are equally conclusive, as in the case of original assessments. Acting under the constitution and laws of

the state, the board therefore represents the state, and its action is the action of the state. The provisions of the 14th amendment are not confined to the action of the state through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever, by virtue of public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition; and as he acts in the name of the state and for the state, and is clothed with the state's powers, his act is that of the state. Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226. Following the above case, the Federal courts throughout the country have frequently reviewed the action of taxing bodies when, under the facts, such action was in effect the action of the state, and therefore reviewable by the Federal courts by virtue of the provisions of the amendment in question. * * *

"The case before us is one which the facts make exceptional. It is made entirely clear that the board of equalization did not equalize the assessments in the cases of these corporations, the effect of which was that they were levied upon a different principle or followed a different method from that adopted in the case of other like corporations whose property the board had assessed for the same year. It was not the mere action of individuals, but, under the facts herein detailed, it was the action of the state, through the board. There is here no contention of illegality simply because of assessing these franchises at a different rate from tangible property in the state, *which the state might do*

(Coulter v. Louisville & N. R. Co., 196 U. S. 599), but it is asserted that the board assessed the franchises and other property of these companies at a different rate and by a different method from that which had been employed by the board for other corporations *of the same class* for that year. The result is an enormous disparity and discrimination between the various assessments upon the corporations. The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the constitution of the state in levying a tax by valuation, 'so that every person shall pay a tax in proportion to the value of his, her, or its property,' was, in this instance, omitted and ignored, *while the board was making an assessment which it had jurisdiction to make under the laws of the state.* This action resulted in an illegal discrimination which under these facts, was the action of the state through the board. Barney v. New York, 193 U. S. 430, holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the state. Such is not the case here."

Raymond v. Chicago Traction Co., 207 U. S. 20 (pp. 35, 37).

The ground on which the court thus distinguished the case before it from Barney v. New York, presently to be examined, will be more apparent when the facts of that case are understood. That distinction, as briefly indicated in the latter part of the above quotation, is that in the Barney case the complainant's pleading (as construed by this court in its opinion in that case, 193 U. S.

at pp. 437, 438) made out simply a violation of the state law; while in the Raymond case there was alleged and shown a violation of the federal constitution (clearly indicated in the preceding sentences of the passage above quoted), being a discrimination between persons standing in the same relation to the law, a denial of the equal protection of the laws, which, being accomplished by a state agency acting within its jurisdiction, must be regarded as the act of the state, although it was clearly contrary to the law of the state.

In Barney v. New York, referred to above, suit was brought to enjoin the city of New York, its board of rapid transit commissioners, and the contractors for the construction of a certain subway or tunnel, from proceeding with the construction of the tunnel under the highway adjacent to the complainant's premises, except according to a certain general route and plans, to which complainant had consented. The essential facts of the case and the nature of the question which it involved, appear from the following passages in the opinion of this court:

> "The city acts through the rapid transit board, *which possesses the powers specifically vested.* It is empowered to prescribe the routes and general plan of any proposed rapid transit railroad within the city, and every such plan must 'contain such details as to manner of construction as may be necessary to show the extent to which any street, avenue, or other public place is to be

encroached upon and the property abutting thereon affected.' Consents of the municipal authorities and the abutting property owners to construction on the routes and plans adopted must be obtained, and any change in the detailed plans and specifications must accord with the general plan of construction, and, if not, like consents must be obtained to such change.

"The bill asserted that the easterly tunnel section under Park avenue was not within the routes and general plan consented to, and that the construction was unauthorized. And this is the view taken by the Supreme Court of New York. * * *

"Thus, the bill on its face proceeded on the theory that the construction of the easterly tunnel section was not only not authorized, but was forbidden by the legislation, and hence was not action by the state of New York within the intent and meaning of the 14th amendment, and the circuit court was right in dismissing it for want of jurisdiction.

"Controversies over violations of the laws of New York are controversies to be dealt with by the courts of the state. *Complainant's grievance was that the law of the state had been broken,* and not a grievance inflicted by action of the legislative or executive or judicial department of the state; and the principle is that it is for the state courts to remedy acts of state officers done without the authority of, or contrary to, state law. Missouri v. Dockery, 191 U. S. 165; Civil Rights Cases, 109 U. S. 3; Virginia v. Rives, 100 U. S. 313."

Barney v. New York, 193 U. S. 430 (pp. 437, 438).

It will be observed that the complainant in that case had very appropriately made defendants in the suit the contractor and sub-contractor by whom the work was being, or about to be, prosecuted. If he had confined his suit to those individuals, proceeding against them as wrongful trespassers upon his property, he would clearly have been entitled, in the proper court of the state, to the relief which he demanded against them. For under the facts as alleged in his bill they would have been unable to show even color of lawful authority for what they proposed to do. Their contract with the rapid transit board could not have protected them, even supposing it to have called for the construction of the tunnel in the particular place to which the complainant objected, because the proceedings of the board, on which the legality of any contract depended, did not provide for construction at that place, but in an entirely different location. The power of the board to cause the construction of the tunnel in any particular location, as appears from the above quoted statement of the facts, was strictly limited, and conditional upon obtaining the consent to such location by the property owners affected. Borrowing the term employed in the Raymond case, *supra*, it is entirely proper to say that the rapid transit board *had no jurisdiction* to cause the tunnel to be constructed at the place of which complaint was made. Hence their act, if

they attempted such construction, and the act of the defendant contractors, even if directed by the transit board (as to which the bill seemed to leave some question,—193 U. S. at page 432), was not authorized by any law of the state, and was therefore not the act of the state. In this we submit there exists a vital distinction between the Barney case on the one hand and the Raymond case and the case at bar on the other.

The wrongful act of which complaint was made in the Barney case did not derive any of its capacity to inflict injury from any authority conferred upon the wrongdoers by the state. The injury complained of was precisely the same as though the individual defendants had undertaken the construction of the tunnel in the street in question, without any previous attempt, even, of the rapid transit board to provide for a tunnel in that street; and the plaintiff in that case, if he had proceeded in the state courts, would have had no more difficulty in making out his title to relief than if the wrong had been so committed, as a mere private trespass.

The situation was entirely different in the Raymond case, and it is equally different in the case at bar. In the Raymond case, as in this case, the fact complained of is one which derives its power to injure wholly from the fact that it is performed by officers and agents of the state invested with authority to perform acts of that very nature.

While the act was in fact contrary to the legal duty of the state agency in question, it was, as aptly expressed by this court in the Raymond case, one which it had *jurisdiction* to perform. And the complainant in that case, precisely as the complainant in the case at bar, was exposed by the act in question to injury, which it could only escape by resort to the courts, and therein establishing the unlawfulness and invalidity of that act; an act to which, because of the official position and authority of those who performed it, a *prima facie* validity and force was accorded by the law of the state. Such *prima facie* validity and force of a legislative rate regulation we have already shown; those of an assessment for taxes, made by a body invested with the assessing function, (with all the penalties that legally follow non-payment of the tax) are too obvious for discussion.

That this court, in deciding the Barney case, did not intend to lay down a rule which would govern such a case as the Raymond case or the case at bar, is evident from the authorities which were cited in the opinion as sustaining that decision, and those which were distinguished as not applicable. To those authorities we wish now to briefly call the attention of the court.

Missouri v. Dockery (191 U. S. 165) came to this court on writ of error to the Supreme Court of Missouri, to review a judgment denying a

mandamus to compel the state board of equalization to re-assess certain corporations, which the petitioner alleged to have been under-assessed, or not assessed at all. The state court had rendered no opinion in support of its decision, and this court suggested that it might well have been based on questions of pleading or procedure, but further said:

> "However this may be, the petitioner admitted, at the argument, that his own tax was correct, and that he would have had no case under the fourteenth amendment if the companies had been exempted altogether. * * * For the legislature could exempt them, and the question whether it has done so or not is for the state courts to decide in their construction of its acts. Furthermore, if the state could grant a total exemption, it could grant a partial exemption, and if it has done so, *de facto*, through its officers, the petitioner cannot come here on an allegation that the officers acted as they did without the authority of the state. That again is for the state court to decide. The petitioner has no case under the constitution of the United States, and nothing else is open."

In other words, the complaint there was merely that subordinate officers of the state had done, without authority, that which, if done by authority of the state, would not have been prohibited by the fourteenth amendment. It was such a case as would be presented here if complaint were made of the rate ordinance of the defendant city

council solely on the ground that the council did not have authority to pass such an ordinance; and not on the ground that the rates presented thereby were confiscatory.

The *Civil Rights* cases (109 U. S. 3) held simply that congress did not have power, under the fourteenth amendment, by direct legislation, to prohibit the denial by merely private individuals, of equal accommodations in inns, public conveyances and places of amusement: since the acts of such individuals, unsanctioned by any law or authority of the state, could not be deemed the act of the state. The distinction between the enactment by congress of such a prohibition, and its enactment of the prohibition under consideration, and sustained, in *Ex parte* Virginia, *supra*, (100 U. S. 339), a prohibition directed against action of state officers, was pointed out, and the authority of the decision in that case was not at all questioned.

Virginia v. Rives (100 U. S. 313), as we have above shown, turned on the construction of R. S. Sec. 641; and as this court has repeatedly stated, in reference to that case and the other cases in the same group, above discussed, it was there held that the prohibitions of the fourteenth amendment were broader than the terms of the statute, that is, that the statute did not attempt to provide for all of the cases of denial of equal pro-

tection and due process which the amendment prohibited.

Reference is also made in the Barney case to the decisions of this court under the eleventh amendment, "which draw the distinction between acts of public officers, *virtute officii*, and their acts without lawful right, *colore officii*." That distinction has frequently been stated thus:

> "Acts done *virtute officii* are where they are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him; while acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them."
>
> Fuller v. Gates, 40 Or. 543 (546), 67 Pac. 416;
>
> 7 Cyc., pages 401, 402, and citations.

Rightly interpreted, the distinction thus stated may afford a true test for determining whether the act of a state officer is the act of the state, for of course it is not every act done by a state officer which can thus be charged to his state. If he acts entirely outside the scope of his authority, so that his act derives no legal effect or consequence because of his official character, such acts are no more the acts of the state than if the officer held no official position or authority at all. Such, essentially, was the nature of the act in the Barney case. A mere assertion of authority by an officer, or even an attempt to exercise it, is not

enough to establish it. In this connection, however, we must suggest the question, how far it may lie in the mouth of persons who have attempted to exert a particular authority under the state, claiming a lawful right to do so, to stultify themselves by denying their own authority, when the consequences of their act are brought judicially into question. The answer to that question is not material to the point we are now considering, and we leave its discussion to another place.

In further considering the line of cases last referred to, dealing with the eleventh amendment, it is to be borne in mind that the principal question determined therein, namely, under what circumstances a suit against a state officer, on account of acts claimed to have been done by authority of his office, is a suit against the state, is a very different question from that now calling for solution: and that the decisions upon the former question cannot be regarded as authority for the latter.

For obviously, if the act of a state officer could be regarded as the act of the state, under the fourteenth amendment, only in those cases in which a suit against the officer on account of such act would be deemed a suit against the state, under the eleventh amendment, then all jurisdiction of the federal courts under the fourteenth amendment would be at an end. It could not have been intended, in the Barney case, to suggest such a

rule of decision, nor would an examination of the cases decided under the eleventh amendment and of the reasoning on which those decisions have been founded, tend to support such rule. This whole subject and the long line of decisions relating to it were exhaustively reviewed by this court in *Ex parte* Young, *supra,* and the jurisdiction of the federal courts to restrain action of state officers as being action of the state under the fourteenth amendment, was emphatically stated to exist in that and similar cases, while at the same time it was asserted, with equal emphasis, that such a suit was not one against the state within the meaning of the eleventh amendment. It would be idle for us to attempt to add anything to that discussion.

Ex parte Young, 209 U. S. 123, pp. 149-160.

Ex parte Virginia (100 U. S. 339) has been already discussed by us; and with all deference to the learned, and now lamented, author of the opinion in the Barney case, we think it must be conceded that this court did *not* consider that it was dealing, in *Ex parte* Virginia, with the judgment of a court. For, as we have seen, it was there held that the act in question was not judicial, but merely ministerial. This court, however, in the Barney case, was undoubtedly justified in regarding *Ex parte* Virginia as distinguishable

from the case before it, for reasons sufficiently indicated in our former discussion.

An examination of the opinions in the three cases cited from the inferior federal courts, on page 440 of the opinion in the Barney case, will disclose that those opinions do not state the facts involved sufficiently to determine their exact bearing on the present question. So far as can be gathered from those opinions, the cases were of substantially the same character as Missouri v. Dockery, *supra, i. e.,* cases in which the acts of the state officers complained of were alleged to be unauthorized by state law, and were claimed, for that reason, to be a denial of equal protection of the law, contrary to the fourteenth amendment; but as clearly shown by this court in the Dockery case, the act of a state officer which is unauthorized by the law of the state cannot be such a violation of the fourteenth amendment, unless it is such an act as would be a violation of that amendment, when done under authority of the state.

With reference to the case of Scott v. McNeal, *supra,* and Chicago etc. R. Co. v. Chicago, *supra,* it will be observed that they are referred to in the Barney decision as cases in which "judgments of the highest judicial tribunals of the state were treated as acts of the state," and it is further remarked that "no question of the correctness of that view arises here." This recognition of the

decision in the two cases mentioned is significant of the ground of decision in the Barney case, since the principle of decision in those cases, as we have seen, and as this court subsequently held in the Raymond case, is applicable to the action of other state officers as well as to the judgments of courts.

So the comment upon the case of Reagan v. Farmers L. & T. Co. (154 U. S. 362) is likewise significant. For while the jurisdiction in that case rested on diversity of citizenship, yet it was also there held that the adoption of a confiscatory schedule of rates by a state railroad commission was a violation of the fourteenth amendment; and as to that feature of the Reagan case, the opinion in the Barney case observes:

> "And as the establishment of rates by the commission was the establishment of rates by the state itself, and the determination of what was reasonable was left to the discretion of the commission, their action could not be regarded as unauthorized, even though they may have exercised the discretion unfairly."

Of similar significance is the observation of the court in the Barney case upon the case of Pacific Gas Improve. Co. v. Ellert, decided by Mr. Justice McKenna, while circuit judge. The complainant there sought to enjoin a city board of supervisors from proceeding with the improvement, as a street, of a tract of submerged land adjoining complainant's premises, which fronted on

navigable waters: it being alleged that the complainant would thus be deprived of property, viz., riparian rights of access, without due process of law. The defendants rested their claim of authority on an act of the legislature of the state, purporting to dedicate the premises as a street. This legislation the complainant assailed as unconstitutional and void. On demurrer, and in opposition to motion for preliminary injunction, it was argued that as the defendant board only had authority to improve streets lawfully dedicated or established as such, it would follow that if the complainant's position was correct, the defendants had no authority to so improve the property in question, and hence their act could not be the act of the state. In the opinion of the learned circuit judge, this contention was rejected as being contrary to the decision of this court in *Ex parte* Virginia, *supra.*

It may be appropriate here to notice one or two of the later decisions of this court, in which the Barney case has been cited on the question of jurisdiction.

In one of these cases, Siler v. Louisville & N. R. Co., an order adopted by a state railroad commission was attacked by a corporation of that state on several grounds, including: (a) that the act creating the commission and defining its powers was in conflict with the federal constitution, because, among other reasons, it would impair

the obligations of a contract between the state and the complainant; (b) that the order in question was beyond the powers of the commission as defined by the act, it being an omnibus order reducing all rates on all railroads in the state, after a hearing as to alleged unreasonableness of all such rates, and not of any particular rate; and (c) that the rates as prescribed by such order were confiscatory and violative of the fourteenth amendment. There being no diversity of citizenship, objection to the jurisdiction was made on the ground that the allegation that the order was beyond the legal powers of the commission, demonstrated that it could not be the act of the state, or open to attack under the fourteenth amendment; and the Barney case, *supra,* was cited in support of this objection. For the purposes of the decision of that case, however, this court disposed of the objection thus:

> "If the averment as to the invalidity of the order of the commission were the only ground upon which a federal question was founded, and if the bill alleged that the order was invalid because it was not authorized by the state, either by statute or in any other way, the objection might be good; but the bill sets up several federal questions."
>
> Siler v. Louisville & N. R. Co., 213 U. S. 175 (page 192).

It will be noticed how very guarded was the concession thus made in favor of the objection

presented in that case: it was only conceded that it "might" be good, and this only *"if the bill alleged* that the order was invalid *because* it was not authorized by the state." Perhaps the court had in mind the possibility, even in such a case, of framing a bill to attack such a rate regulation, both on the ground that it was beyond the lawful powers of the body enacting it, and at the same time on the further ground that, if within the authority conferred on the body by the state, the order was nevertheless confiscatory, and therefore violative of the federal constitution. Such a bill was impliedly sanctioned in certain of the decisions cited in the Siler case (213 U. S. at page 191) to the rule that state and federal questions may be united in one bill, and the case disposed of on the state questions alone, although the jurisdiction depends on the federal questions. Such a double fronted attack has also been apparently sanctioned by other decisions of this court.

See:

Hamilton Gas Co. v. Hamilton, 146 U. S. 258;

Manigault v. Springs, 199 U. S. 473;

Michigan C. R. Co. v. Powers, 201 U. S. 245.

But whatever might be held as to the propriety of such a bill, it is clear that what this court said in the Siler case with regard to the objection to

jurisdiction under the fourteenth amendment, had reference solely to an allegation such as was there made that the action in question was wholly beyond the delegated power of the body attempting to take it. That allegation showed a want of jurisdiction equivalent to that which was exhibited by the bill in the Barney case.

In the remaining case, Memphis v. Telephone Company, in which Barney v. New York has been cited on this point, a like lack of authority,—an absence of jurisdiction,—was alleged by the complainant. There an injunction was sought against a municipal ordinance regulating telephone rates and the bill alleged that the defendant city had no power under its charter to enact such an ordinance, although it was also alleged that the rates prescribed were confiscatory. The majority of this court were of the opinion that the allegation of confiscatory character was to be construed, in harmony with the allegation of total want of authority to prescribe rates, as referring only to the state constitution, which also expressly forbade deprivation of property without due process of law; for no mention was made in the bill of the federal constitution, and there had been no attempt to frame the bill so as to give it a double aspect (although it was conceded that such a double-pointed attack might be permissible). It was concluded that the case was not one in which a state statute was "claimed" to be in contraven-

tion of the federal constitution, within the meaning of the act of congress regulating the respective jurisdictions of this court and the circuit court of appeals. (Three members of the court, however, dissented, holding that the "claim" required by the statute was sufficiently shown by the opinion of the trial court, which based its decision of the case on the invalidity of the statute under the federal constitution.)

Memphis v. Telephone Co., 218 U. S. 624.

It is worthy of observation, in the consideration of the last cited case, that neither in the prevailing nor in the dissenting opinion was there any suggestion that federal jurisdiction in the case was defeated by the fact that the state constitution also prohibited deprivation of property without due process of law. And certainly there is nothing in that case or in the Siler case, *supra*, which in any way qualifies the rule affirmed and applied in the Raymond case, and the prior decisions of this court, above cited.

OPINION OF THE COURT BELOW.

This court will have discovered from reading the opinion of the learned district court in this case [Rec. p. 41] that it considered that its decision must be governed by certain prior decisions of the court of appeals of the ninth circuit; and we shall now discuss those decisions, and show, we believe, that they do not decide our question.

The first of such decisions was rendered in an action brought by one street railway corporation against another to enjoin the construction and operation by the latter of a second street railway in the same street occupied by the complainant. There was no diversity of citizenship, and a federal question was attempted to be set up by the following allegation, quoted in the opinion of the court of appeals:

> "That said alleged ordinance No. 22,933 was granted by the city of Seattle to the said the Seattle Electric Company, defendant herein, in violation of the terms and conditions of the franchise now owned and used by the complainant company evidenced by ordinance No. 15,919, and that said alleged ordinance No. 22,933 was obtained by said the Seattle Electric Company in fraud of the rights of complainant, and granted illegally without right by the city of Seattle, and by the terms of said alleged ordinance the property, rights, and privileges enjoyed by this complainant will be taken from it without due process of law and in contravention of the constitution and laws of the United States, and that said alleged ordinance is without authority in law and is null and void and of no force and effect."
>
> Seattle Electric Co. v. Seattle etc. Ry. Co., 185 Fed. 365 (p. 369).

But the complainant's bill in that case further showed that its own franchise contained an express provision that the rights thereby granted should not be deemed exclusive, and that the city

of Seattle therein reserved the right to grant to others, or to exercise itself, the right to construct and operate "a line or lines of railway" over the same streets; and furthermore, the ordinance granting the defendant's franchise, which the complainant assailed, contained an express provision that before any railway tracks should be constructed thereunder "in any location where any person or company [is] entitled to compensation for damages occasioned thereby," such damages must be first "settled according to law." Accordingly the circuit court of appeals well said:

> "Manifestly the ordinance is not in conflict with the constitution of the United States. Instead of taking complainant's property without due process of law, it expressly provides that it shall not be so taken. There is no right claimed under it by the defendant contravening any rights secured to the complainant under the constitution of the United States. This proposition requires no discussion. It appears plainly and distinctly upon the face of the ordinances."

This clearly disposed of the case. But the court of appeals, in the portion of its opinion by which the court below considered itself bound, went on to say that there appeared to be another ground of objection to the jurisdiction of the circuit court, which it stated thus:

> "If it should be conceded that in some view of the ordinance and defendant's action under color of its provisions there would be a taking of complainant's property without

due process of law, still it would not follow that the circuit court had jurisdiction of the case unless the ordinance in that aspect would be the supreme law of the state. The supreme law of the state is the constitution of the state; and that document provides, in article 1, section 3, as does the fourteenth amendment to the constitution of the United States, that:

"'No person shall be deprived of life, liberty, or property without due process of law.'

"Under this provision of the state constitution the ordinance would be as invalid as under the federal constitution. It would not be a state law. It would be with respect to the former, as the complainant charges in its complaint with respect to the latter, 'without authority in law, null, and void, and of no force and effect.' The presumption is that the courts of Washington will not deny to any of its citizens or corporations the equal protection of its constitution. If, however, it should turn out that we are mistaken in this respect, the complainant will have his remedy in an appeal from the highest court of the state to the supreme court of the United States."

Seattle Electric Co. v. Seattle etc. Ry. Co., 185 Fed. Rep. 365 (p. 372).

Now, if the nature and effect of the ordinance there in question are borne in mind it will appear, we think, that the ground of decision thus stated by the circuit court of appeals, while possibly correct as applied to the case before it, has no application to such a case as that at bar. The ordinance complained of in the Seattle case was mere-

ly a grant of permission to construct and maintain a railway in the streets of the city. If, as the complainant alleged, this ordinance deprived it of property without due process of law, it was void under the state constitution and, as stated in the language of the bill quoted by the circuit court of appeals, it was *"of no force and effect."* It was a mere nullity. It constituted no license to the defendant for any invasion of the property or rights of the complainant. If the defendant attempted any such invasion it would be, notwithstanding the ordinance, a mere trespasser, and the complainant could treat it as such, because the ordinance was void.

It must be further observed that the defendant in that suit was a private corporation holding no office and exercising no authority under the state of Washington, or even under the city of Seattle. The bill in that case showed no more reason or excuse for a resort by the complainant to the federal court for protection against the wrongful acts of the defendant in that case than if the same acts had been done or threatened by the defendant without the city council having previously gone through the form of enacting the void ordinance. In no possible view of the case, as it was stated in the complainant's own bill, could such acts of the defendant be regarded as acts of the state of Washington. They did not derive any force, or

capacity to injure the complainant, from any act of the state or of any agency of the state.

The features of the case at bar which distinguish it radically from the Seattle case we have elsewhere discussed, and the briefest mention here will suffice. The ordinance complained of in our case prescribes a schedule of rates to be charged by the complainant, which rates are, by the law of the state, *prima facie* valid and binding. This ordinance requires no judicial action or sanction to make it effective and operative. On the contrary, complainant can escape from its effect only by judicially establishing its nullity because of the confiscatory character of the rates prescribed. Moreover, pending such judicial annulment, the complainant must either conform to these rates or run the risk of penalties which may confiscate all its property in fines, and subject all its officers and agents to years of imprisonment; and the further risk, we may add, of forfeiting its franchises and charter for violating the laws of the state which created it and granted its franchises. And all of these consequences attach to this ordinance because, and solely because, the state of California has invested this city counsel with the legislative power of prescribing telephone rates and the legislative power of making the violation of its ordinances a misdemeanor, punishable by fine and imprisonment. If the state of California had *not* vested such powers in the council, then, but only

then, its ordinance would have been as nugatory, and as devoid of capacity to injure the complainant, as the ordinance involved in the Seattle case.

In support of its *opinion* in this Seattle case, the circuit court of appeals relied on the case of Hamilton Gas Co. v. Hamilton (146 U. S. 258), where a city ordinance providing for the erection of municipal gas works was attacked as being beyond the corporate powers of the city (but also as being, if authorized, an impairment of contract obligations between the city and the complainant). This court there said:

> "A municipal ordinance *not passed under supposed legislative authority* cannot be regarded as a law of the state within the meaning of the constitutional prohibition against state laws impairing the obligation of contracts."

But the Court of Appeals seems to have overlooked a very important feature of the Hamilton case; namely, that this court there *sustained* the jurisdiction of the Circuit Court over the case, as presenting a federal question, although the complainant itself had thus denied the authority of the defendant city, under the law of the state, to take the action in question; this, for the reason that the defendant city did not *concede* its want of authority but instead claimed to have the authority in question under a statute of the state, giving color to that claim. We respectfully submit that this reasoning is also pertinent to the case at bar,

where the defendants have asserted and assumed to exercise the authority of the state in question, and sustains the federal jurisdiction. And we are constrained to add that this reasoning seems to us contrary to the theory advanced in the opinion of the circuit court of appeals in the Seattle case, by which the learned court below considered itself controlled in the case at bar.

The opinion in the Seattle case also cites a passage from 5 Ency. U. S. Sup. Ct. Rep., p. 545, to the effect that "the doctrine here is that the aggrieved party must first invoke the aid of the state courts to remedy the acts of state officers done without authority of, or contrary to, state law." The class of cases referred to in this passage is evident from the preceding sentence, which reads: "In such cases the grievance is simply that the state law has been broken, and not that the state has inflicted a wrong through its legislative, executive or judicial department." And it is further evident from the cases referred to in the notes to the passage quoted, which are: Barney v. City of New York, *supra;* Virginia v. Rives, *supra,* and Missouri v. Dockery, *supra,*— all of which we have sufficiently discussed, and shown that they are not analogous to the case at bar. In the next previous note on the same page of the work cited, the case of Owensboro Waterworks v. Owensboro (200 U. S. 38) is also cited, which answers exactly to the description given in

the sentence last above quoted, viz., a case where "the grievance is simply that the state law has been broken."

The purport of the decision in the Seattle case is further shown by the explanation thereof in the subsequent decision of the same court in San Francisco v. United Railroads (190 Fed. 507), where injunction was sought against the construction and operation of a municipal street railway by the defendant city. The claim of the plaintiff there was that by the terms of its franchise grant, and of a statute of the state concurrently in force, there had been created a contract in plaintiff's favor limiting the extent, to which any other street railway might be authorized to occupy the same streets, to a certain number of blocks; and that the proceedings of the city for the construction of the proposed municipal railway amounted to a law of the state impairing the obligation of such contract, because such proceedings provided for the construction of a railway for a greater number of blocks than the prescribed limit. But the statute of the state on which the complainant relied as so restricting subsequent railway franchise grants was still in force; so that, if the complainant's contention as to the application of the statute was correct, the proceedings of the municipality, so far from being authorized by the state, were in direct violation of its statute governing such proceedings. Hence

the court of appeals rightly held that, under the facts of that case, such municipal proceedings could not be regarded as the act of the state.

In truth, we do not see upon what theory it can be said that the proceedings of the city council and electors of San Francisco, looking to the construction and operation of the municipal railway there in question, can be regarded as the exercise of either legislative or any other authority of the state, unless they can be deemed analogous to the granting of a franchise by the city to a private corporation. If the action involved had actually been of that character,—if the city had granted a franchise to a private corporation over the same route which the municipal railway proposed to occupy, such grant necessarily would have been of no force or effect as to so much of the route as exceeded the statutory limit, and it would not have given the grantee any legal right or actual power to take possession of the street occupied by the complainant within the prohibited limits. As to that portion of the franchise the grant would have been a mere nullity, and any attempt by the grantee to take possession of such portion of the route would have been a mere naked trespass, without color of legal right.

It is of no consequence that the city had been granted the charter power to construct or acquire, and operate, a municipal street railway. Manifestly such a charter provision could no more au-

thorize interference with a vested franchise right than it could the forcible taking of any other privately owned property. Neither can the exercise of such a charter power be regarded as an exertion of the authority of the state, any more than the exercise of the same power by an ordinary railway corporation could be so regarded.

The proceedings of the municipality in the San Francisco case, therefore, to the extent that they interfered with the rights of complainant, were a mere unlawful trespass, and like the action of the private railway corporation under the ordinance attacked in the Seattle case, they derived no force, or capacity to injure the complainant, from any legislative or other act of the state. The city of San Francisco, in attempting to construct and operate a municipal railway, was not in any sense acting as the agent of the state, or exercising any authority or power of the state, but merely one of its own corporate powers. And if its action was a wrong to the complainant, as it claimed, the law of the state afforded the municipality no more immunity than any other wrongdoer.

If such action of a city as that sought to be enjoined in the San Francisco case could be said to be the act of the state, then the act of a private railroad corporation in attempting to take forcible and wrongful possession of property wanted for its roadway could with equal propriety be said to be the act of the state, merely because the state

had conferred upon such corporation its organic capacity, and its charter power to construct a railway.

Hence the San Francisco case bears a close analogy to the case of Dawson v. Columbia etc. Co. (197 U. S. 178), cited in the opinion in the San Francisco case, where proceedings of a defendant city for the construction of waterworks were sought to be restrained as impairing the obligation of a contract with the water company (on whose behalf the suit was prosecuted by its mortgagee) to take and pay for a water supply. This court observed that the injury complained of amounted merely to the refusal of the defendant city to perform its contract and that, "the mere fact that the city was a municipal corporation does not give its refusal the character of a law impairing the obligation of contracts or depriving the citizen of property without due process of law."

The case of Louisville v. Telephone Co. (155 Fed. 725), also cited in the San Francisco case, is another clear example of a total want of authority in the subordinate body whose act was in question. The bill in that case sought to enjoin the enforcement of a city ordinance, purporting to prescribe telephone rates, as being confiscatory, and also as impairing the obligation of a contract; but it was distinctly alleged in the bill itself that the defendant city had not been vested with any

authority to enact such an ordinance. (No suggestion appears to have been made in the case that the bill might have been regarded as setting up independent grounds of attack, one presenting a state and the other a federal question.) In denying jurisdiction the court of appeals said:

> "If the state has conferred authority upon the municipality to establish and enforce reasonable rates for telephone service, then the establishment of rates under this power would be the establishment of rates by the state itself. Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362. But this is just what the bill charges has not been done, thereby depriving the circuit court of every foundation for its jurisdiction as a suit arising under the constitution or laws of the United States."
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> Louisville v. Telephone Co., 155 Fed. 725 (p. 729).

In view of the authorities thus cited by the circuit court of appeals in the San Francisco case the principle on which it proceeded is apparent, and no doubt is left as to the significance of its statement concerning the prior decision in the Seattle case, that it was "in line with these authorities." But it is clear, we submit, that all the cases in that line of decision present an essentially different state of facts from any of the cases in the line of decision which we have above invoked, commencing with *Ex parte* Virginia, *supra* (100 U. S. 339), and culminating in

Raymond v. Chicago Traction Co. (207 U. S. 20). It is likewise clear, we submit, that the case at bar falls within the latter class and not the former.

We respectfully submit, therefore, that the learned court below was overscrupulous in feeling constrained by these decisions of the circuit court of appeals to deny federal jurisdiction in the case at bar; that those decisions, when fairly read, do not require the construction which was thus impliedly placed upon them. Neither the facts in those cases, nor the reasons on which the court essentially founded its decisions therein, serve to bring those cases into analogy with the present case; and we question if we have not been at unnecessary pains to establish the points of difference.

The only distinction which the learned opinion of the district court has suggested between the case at bar and Raymond v. Chicago Traction Co., *supra*, is that the latter case involved the action of an agency created for state purposes, while here the questioned action is that of a municipal corporation which, it is said, "does not act in the name of the state and is not created for general state purposes but purely local needs." [Rec. p. 43.] Here again, though with the most sincere respect for the opinion of the learned court below, we must submit that it has allowed its solicitude to follow the precedents of its immediately su-

perior jurisdiction to obscure its view of the principles involved.

We further submit that no tenable ground can be found in the terms or intent of the fourteenth amendment, or in the decisions of this court construing and enforcing it, for drawing any distinction between the different classes of agencies which the state, by its legislative power, may create. A distinction, indeed, exists between the state legislature and the subordinate agencies to which it may delegate authority. The latter can act only by virtue of such delegation. But in this regard no difference is perceived between the board of equalization, created for a specific purpose, and with limited powers, which was before the court in Raymond v. Chicago Traction Co., *supra,* and the municipal corporation which is defendant in the case at bar. Each alike exercises within the sphere of its appointed jurisdiction the power of the state. It was solely because of the power conferred upon them by the state that either was able to work the injury complained of in these respective suits. And surely neither of these agencies had any greater license than the other to violate the constitution of its state.

Further, we respectfully submit that whether in a given case it can be said that a municipal corporation does or does not act in the name of the state depends upon the character of the act done, or of the power which is exerted in the doing

of it. It may well be said, as we have endeavored to show, that the threatened action of the municipality which was involved in the case of San Francisco v. United Railroads would not have been, even if valid, an action in the name of the state, nor the exercise of a power of the state. We question if the same could be said of the action of the city which was under discussion in the Seattle case, namely, the granting of a street railway franchise; but that action, as we have pointed out, was only indirectly involved. The injunction there sought was against acts of a private corporation, and the case could not be brought within the fourteenth amendment unless, at least, such action had the sanction of some law of the state (even supposing that that would be sufficient to make a case under the amendment). And as we have tried to show, the ordinance of the city did not constitute such sanction, in the first place because it expressly reserved from the effect of the franchise grant any previously existing rights of the character claimed by the complainant; in the second place because, if the ordinance had attempted to authorize interference with such existing rights it would have been beyond any legislative power which the state had conferred upon the city.

But certainly, we submit, it must be granted that in taking such action as is involved in the case at bar, namely, the prescribing of public utility rates,

the city acts in the name, and exercises a power, of the state. The prescribing of rates has always been recognized as a legislative power of the state itself which could be exercised by subordinate bodies only through a delegation of the state's power. This is implied, indeed, in many of the very cases cited in these decisions of the court of appeals which we have been reviewing. It is well settled that this power is not among the inherent or implied powers of a municipal corporation, but must be expressly delegated by the state to authorize its exercise by a municipality.

Dillon, Mun. Corp. (5th Ed.), Sec. 1325.

The sovereign nature and high importance, politically, of this power to regulate rates are testified, in a long line of decisions, by the jealousy exhibited by this court in scrutinizing, and frequently rejecting, the claim that a state legislature had contracted away the power, or had authorized such a contract to be made by a subordinate body to which the rate regulating power had been delegated. Most of the preceding cases on this point were cited by this court in a recent decision (delivered in a case arising between the parties to the present litigation), in which it was said:

> "The power to fix, subject to constitutional limits, the charges of such a business as the furnishing to the public of telephone service, is among the powers of government, is legislative in its character, continuing in its

nature, and capable of being vested in a municipal corporation. * * *

"But for the very reason that such a contract has the effect of extinguishing *pro tanta* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power."

Home Telephone & Tel. Co. v. City of Los Angeles, 211 U. S. 265 (271, 273).

Clearly, then, in enacting the ordinance complained of here, prescribing the rates to be charged to the public by the complainant for telephone service, the defendant city was exercising one of the powers of the state, which had been duly delegated to it. If there had been no previous delegation of that authority then, indeed, our case might fall in the same class with the decisions of the circuit court of appeals cited in the opinion of the learned court below. But that delegation of authority, about which no question exists in this case, plainly and radically distinguishes our case from those decisions and from all of the cases which have been relied on in support of the defendants' objection to federal jurisdiction in this case.

The exercise of such a delegated power, though injuriously, is one thing; and the attempt to exercise a power not given—one purely *ultra vires*—is quite a different thing.

We confidently submit, therefore, that the original jurisdiction of the federal courts in such a case as that at bar is fully sustained by the principle of decision announced by this court in *Ex parte* Virginia, *supra* (100 U. S. 239), and the several cases above cited approving and following that decision, and particularly the case of Raymond v. Chicago Traction Co., supra (207 U. S. 20); and that these principles are not qualified, nor their application to the case at bar made doubtful by any other decision of this court, or of the lower federal courts.

V.

The Defendants Having Asserted Their Authority to Enact and Enforce the Rate Regulation Here in Question, and Admitting Their Intention, Unless Restrained, to Continue its Enforcement, are Estopped to Question Their Own Authority In the Premises, for the Sole Purpose of Compelling Complainant to Litigate that Question in the State Courts.

It will not have escaped the notice of this court that in every one of the cases relied on in support of the defendant's objection, and which we have above reviewed, the pleadings of the complainant itself alleged the lack of state authority for the acts complained of. Of precisely opposite character is complainant's bill in this case, which affirmatively alleges the delegation of authority by

the state to the defendant city to prescribe the rates to be charged by complainant and other public utility corporations. [Bill, Par. VI, Rec. fol. 9.] This consideration alone, we submit, is sufficient to distinguish our case from those which are supposed to be adverse to our contention. At this point we call attention again to the language above quoted from the decision of this court in Siler v. Louisville & N. R. Co., in which it was said that a similar objection to the jurisdiction in that case might be good "*if the bill alleged* that the order was invalid because it was not authorized by the state."

> Siler v. Louisville & N. R. Co., 213 U. S., at p. 192.

We also call attention again to what we said before concerning the decision of this court in Hamilton Gas Company v. Hamilton, where it was said:

> "We sustain the jurisdiction of the Circuit Court because it appears that *the defendant grounded its right* to enact the ordinance in question, and to maintain and erect gas-works of its own, upon" a statute of the state —the construction of which was, apparently, a principal dispute between the parties.
>
> Hamilton Gas Co. v. Hamilton, 146 U. S. 258, p. 266.

Furthermore, we urge the court to consider the attitude in which defendants place themselves be-

fore the court by making this objection. In all their conduct and dealings with the complainant, in respect to the matters in controversy, before this suit was commenced, the defendants asserted the authority of the city of Los Angeles by its council to enact the ordinance in question. The fact of such conduct on their part clearly appears from the allegations of the bill, which their plea in effect admits. And they likewise admit their intention to enforce that ordinance against the complainant (unless restrained by the court) even by the means, if necessary, of criminal prosecutions for its violation.

Yet in the face of all this, defendants insist, in support of their objection to the jurisdiction of the court below, that the complainant must go into the courts of the state and there controvert the authority of the defendants, which they themselves have so asserted, and which they will, of course, seek to maintain in any such action which may be brought in the state courts. Thus, if their objection here prevails, defendants will have first asserted their authority in their every act prior to the commencement of this suit; then, in this suit, raised the question of that authority, which question the complainant was willing to waive; and lastly, having forced complainant to go into the state courts and contest their authority, defendants will again affirm that authority, and do their utmost to maintain it.

This is evidently not the ordinary case of a defendant, accused of wrongdoing, who is allowed to object to the jurisdiction of the court to redress that wrong while he expressly or tacitly admits having committed it. The complainant here alleges a particular wrong on the part of the defendants, namely, their violation of the federal constitution. The defendants say, in effect, that they have not committed that offense, but that they have committed another, namely, a violation of the state constitution; and that complainant must pursue them in the state courts for any redress against such latter wrong. But if their plea is allowed, and the complainant compelled to sue them in the state courts, defendants will then change their position again, and deny that they have committed any such violation of the state constitution.

We earnestly submit that to permit a defendant to pursue such a course subverts the ends of justice. That no person or body of persons who have, out of court and prior to suit, asserted and assumed to exercise any official authority to the injury of another (and which could not occasion any injury unless they were able to so exercise such authority) ought to be heard in court to deny or question that authority, and thereby prevent the granting of redress for such injury.

In this aspect of the case at bar, it is, we sub-

mit, within the principle declared by this court in Daniels v. Tearney, where it was said:

> "It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that where a party has availed himself, for his benefit, of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect."
>
> Daniels v. Tearney, 102 U. S. 415. (p. 420.)

If we are right in this view, it is an end of defendants' objection to the jurisdiction here, regardless of all our other contentions,—and we submit that it must be so held.

VI.

Federal Jurisdiction to Grant Relief in a Given Case is Not Defeated by the Possibility of Obtaining Like Relief in the State Courts. The Suitor Cannot be Denied his Choice of Forum.

It may possibly be suggested, in answer to certain of the arguments we have heretofore advanced, that the evils which we have shown inevitably follow from the enactment of a rate regulation under an appropriate delegation of legisla-

tive authority, especially where the violation of such regulation is made a penal offense, might be avoided by bringing an equitable action in the state courts, seeking such an injunction as is here prayed by complainant's bill; and that such relief should be sought in the state courts, followed by an appeal to this court if it should be denied.

The same contention, in effect, was made in Willcox v. Consolidated Gas Co., a case of like impression, and was disposed of by the opinion of this court as follows:

> "At the outset it seems to us proper to notice the views regarding the action of the court below, which have been stated by counsel for the appellants, the public service commission, in their brief in this court. They assume to criticise the court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (Cohen v. Virginia, 6 Wheat. 264, 404), and, in taking it, that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which, by law, brings the case within the jurisdiction of a federal court. The right of a party plaintiff to choose a federal court where there is a choice cannot be properly denied. *Re* Metropolitan R. Receivership,

208 U. S. 90-110; Prentis v. Atlantic Coast Line R. Co., 211 U. S. 210. In the latter case it was said that a plaintiff could not be forbidden to try the facts upon which his right to relief is based before a court of his own choice, if otherwise competent. It is true an application for an injunction was denied in that case because the plaintiff should, in our opinion, have taken the appeal allowed him by the law of Virginia while the rate of fare in litigation was still at the legislative stage, so as to make it absolutely certain that the officials of the state would try to establish and enforce an unconstitutional rule.

"The case before us is not like that. It involves the constitutionality, with reference to the federal constitution, of two acts of the legislature of New York, and it is one over which the Circuit Court undoubtedly had jurisdiction under the act of congress, and its action in taking and hearing the case cannot be the subject of proper criticism."

Willcox v. Consolidated Gas Co., 212 U. S. 19 (40).

The practical importance, and necessity, of preserving this right to choose the forum in cases of the present character were clearly set forth in Prentis v. Atlantic etc. Co. (cited in Willcox v. Gas Company, *supra*). Speaking by Mr. Justice Holmes, this court there said:

"If the railroads were required to take no active steps until they could bring a writ of error from this court to the supreme court of appeals after a final judgment, they would come here with the facts already found against them. But the determination as to

their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two,—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing, if otherwise competent. 'A state cannot tie up a citizen of another state, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts.'"

Prentis v. Atlantic Coast Line Co., 211 U. S. 210 (228).

As supporting this doctrine, the court in the Prentis case cited several of its previous decisions, including:

Reagan v. Farmers' Loan & T. Co., 154 U. S. 362, 391;

Smyth v. Ames, 169 U. S. 466, 517;

McNeill v. Southern R. Co., 202 U. S. 543;

Ex parte Young, 209 U. S. 123, 165.

In some of the above cited cases, it is true, there was diversity of citizenship to support federal jurisdiction. Whether this was so in all of the cases disposed of by the opinion in Prentis v. Atlantic etc. Co., *supra*, is not clear to us from the report. But the point is immaterial, since this

court, in Willcox v. Gas Co., *supra,* expressly declared the same principle applicable to jurisdiction dependent on the nature of the controversy.

Recognition by the court of the same considerations concerning the nature of the issues to be determined in such a case as the present was likewise shown in the opinion delivered in *Ex parte* Young, just above cited, portions of which we have already quoted. See, particularly, 209 U. S., at pp. 147, 148.

It is readily apparent from these considerations that if the jurisdiction of the federal courts to enforce the fourteenth amendment in cases of the present impression were restricted to a review of the judgments of state courts on writ of error to this court, the practical effect would be to make the state courts the final judges of what should constitute due process in the legislative enactment of rate regulations. Such a result would be plainly contrary to the terms and intent of the federal constitution. For that instrument, while it expressly declared itself to be "the supreme law of the land," and further declared that "the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding," it did, at the same time, make specific provision for courts of the United States, and declared that their "judicial power" should extend to "all cases in law or equity aris-

ing under this constitution" and the laws of the United States.

This is manifestly, we submit, just such a case as Chief Justice Marshall, with characteristic foresight, anticipated would occur unless a federal constitution were construed to give the federal courts jurisdiction of a case involving a federal question, although such case might also involve state questions. For, speaking for this court in Osborn v. Bank, he said:

> "On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law; * * * and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will."
>
> Osborn v. Bank, 9 Wheat. 738, p. 822.

In another of his illuminating decisions Chief Justice Marshall, speaking for this court, had occasion to discuss the objects which the federal constitution intended to secure by this creation of a national judiciary. While these observations were made with special reference to the particular question then before the court, namely, —whether the presence of a state as a party ex-

cluded the jurisdiction of this court over a case otherwise within its constitutional cognizance,—they are of universal application to questions of federal jurisdiction under the constitution and they have always been so treated in subsequent decisions. We shall therefore conclude our argument on this point by briefly quoting from that leading case:

> "The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases, of every description, arising under the constitution or laws of the United States."
>
> "When we observe the importance which that constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a state shall prosecute an individual who claims the protection of an act of congress."
>
> "The evident aim of the plan of the national convention is, that all the causes of the

specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union."

Cohens v. Virginia, 6 Wheat. 264 (382, 387, 420).

VII.

Although the Constitution of the State Prohibits Deprivation of Property Without Due Process of Law in the Same Terms as the Federal Constitution, the Allegation that an Act is Contrary to the Federal Prohibition is Not an Allegation that Such Act is Contrary to the State Prohibition. The Assumption, Implied in Defendants' Contention, that the Two Constitutional Prohibitions are Identical in Operation and Effect is Contrary to Historical Fact.

Thus far in our argument we have granted the assumption, necessarily involved in the contention of defendants, that the bill of complaint in this case must be regarded as showing that the action of the defendants which is sought to be enjoined will violate the guaranty of due process in the state constitution. We propose now to show that this assumption is not correct: that the bill does not exhibit any such violation of the state constitution, and that consequently there is no foundation in the case for the defendants' objection to federal jurisdiction thereof, and that such objection cannot be sustained, even though every rea-

son which we have hitherto advanced against it should fail.

There have been a very great number of cases in this court, which have come here from the highest courts of the several states whose constitutions contain a guaranty of due process, in which cases this court has held legislative or other acts of a state to be wanting in due process of law within the purview of the fourteenth amendment, where the same acts had been held by the state courts not to be wanting in due process under the state constitution. Every such case exemplifies our contention that, as a matter of historical fact, a state guaranty of due process is a thing entirely distinct from the federal guaranty, and that a violation of one is not necessarily a violation of the other. We shall not undertake to cite any considerable number of such cases, but we desire to call the court's attention to at least one which involved the same sort of state action as that here in question, and has, besides, a special bearing on our present contention.

In Chicago, etc., Ry. Co. v. Minnesota, which came here on writ of error to the Supreme Court of Minnesota, that court had construed an act of the state legislature as making the rates prescribed by a state railroad commission conclusive against any attack in the courts, and had held such an act, and an order of the commission made thereunder, valid and constitutional against the

specific objection that it deprived the railroad company of its property without due process of law. The action was mandamus, by the commission, to compel a railroad company to conform to the rate prescribed, to which the company sought to interpose the defense that the prescribed rate was unreasonable and would not afford fair or just compensation; which it was not permitted to do.

State v. Chicago, etc., Ry. Co., 38 Minn. 281 (pp. 287, 296-8).

In reviewing that judgment, this court did not consider itself at liberty to set aside the construction thus given to the act by the state court: but it held that, if so construed, the act violated the guaranty of due process, as well as of equal protection of the laws, under the fourteenth amendment and was void.

Chicago, etc., Ry. Co. v. Minnesota, 134 U. S. 418.

The above cited decision is specially apposite in the case at bar, because the state of California, by the same constitution (adopted in 1879) which embodies the guaranty of due process on which the defendants rely (and which, it may be noted, is identical in terms with that contained in the constitution of Minnesota, Art. I, Sec. 7), also expressly provided with respect to the railroad commission created by that instrument, that:

> "In all controversies, civil or criminal, the rates of fares and freights established by such commission shall be deemed conclusively just and reasonable."
>
> Cal. Const. 1879, Art. 12, Sec. 22 (printed in Cal. Stats. 1909, p. XLVII).

Recent amendments to the constitution of California have somewhat altered the organization and functions of this state railroad commission, and have eliminated from the constitution itself the specific provision above quoted. But these amendments declare that:

> "The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the state of California, and to fix the rates to be charged for commodities furnished, or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be *unlimited by any provision of this constitution.*"
>
> Cal. Const., Art. 12, Sec. 23 (Am. Oct. 10, 1911); Stat. Cal. 1911, p. 2165.

Pursuant to this *carte blanc* authority, the legislature has made the rate regulations and all other orders of the commission conclusive upon the courts, except that the proceedings of the commission, before becoming final, are permitted

to be directly reviewed by the Supreme Court, to a certain limited extent.

Act of Dec. 23, 1911, Secs. 67, 70; Cal. Stats., Spl. Sess. 1911, pp. 55, 56, 58.

Such review by the State Supreme Court, of course, is merely a part of the legislative proceedings of the commission for the establishment of the rate, or other order, under the decision of this court in

Prentis v. Atlantic, etc., Co., 211 U. S. 210.

These provisions of the constitution of California, as adopted in 1879, and of the above statute enacted under the explicit sanction of the amendments of that constitution in 1911, by which conclusive effect is attempted to be given to the rate regulations of the railroad commission, demonstrate that the guaranty of due process in that constitution cannot be given the same operation and effect as the guaranty of the fourteenth amendment, although the latter is expressed in the same terms. For the state of California, by a form of legislation which is necessarily binding upon its courts, has constituted as due and sufficient process that which this court has declared to be prohibited by, and void because of, the provisions of the fourteenth amendment to the federal constitution.

It may be argued against our present conten-

tion that the state constitutional legislation which we have cited above does not apply to, and would not govern state courts in dealing with, the action of a municipal council in prescribing utility rates; and that if, in our case, the state courts would give such construction and effect to the state constitution as to nullify the ordinance here in question, this would be the equivalent of the federal guaranty.

To that we would reply, in the first place, that it cannot be shown that the courts of California would give such construction and effect to the state constitution; that, on the contrary, the history of this class of litigation in the decisions of the Supreme Court of California shows that it is only in deference to the federal constitution and the decisions of this court thereunder that the relief which complainant here seeks is awarded by the courts of the state.

In San Diego Water Co. v. San Diego, referring to a previous decision (the first, we believe, in which the question of constitutional limitations upon the legislative power of rate regulation was considered by that court) and to a provision of the constitution authorizing municipalities to fix water rates, the Supreme Court of California said:

> "Although that case was decided without the light cast on the subject by later decisions of the Supreme Court of the United States, and contains some observations which per-

haps may require modification, we are satisfied with the correctness of the construction there given to this section of the constitution."

San Diego Water Co. v. San Diego, 118 Cal. 556 (p. 566).

Among the observations in the former case to which the court thus referred were doubtless the following:

"It may also be conceded, for the purposes of this case, that when the board of supervisors have fairly investigated and exercised their discretion in fixing the rates, the courts have no right to interfere, on the sole ground that in the judgment of the court the rates thus fixed and determined are not reasonable. That such is the case is attested by numerous authorities." (Citations.)

"To fix rates not reasonable or compensation not just is a plain violation of its duty. But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing."

Spring Valley Water Works v. City and County of San Francisco, 82 Cal. 286 (pp. 305, 306).

A reading of the several concurring and dissenting opinions (five in all) delivered by the different members of the court in San Diego Water Co. v. San Diego, *supra,* will disclose that the court in that case did not make much advance beyond the position taken in Spring Valley Water Works v. San Francisco, *supra,* and that there was no agreement upon the principles which the later decisions of this court have established as being implied in the federal guaranty of due process in its application to legislative action of this character.

And if the more recent (we believe, the last reported) decision of the state court upon these questions is examined, it will be readily apparent that it is the decisions of this court interpreting the fourteenth amendment to the federal constitution that the state court regards as establishing the law which it applies in determining the validity of the legislatively adopted rate regulation.

Contra Costa Water Co. v. Oakland, 159 Cal. 323 (particularly pp. 334-5).

We therefore submit that in view of this course of judicial decision in the state of California, it cannot be said that the guaranty of due process in the state constitution is construed or enforced by the courts of that state as the fourteenth amendment is construed and enforced by this court with regard to legislative rate regulations;

that, on the contrary, the courts of that state, in cases involving attacks on such regulations, consider that they are governed by, and are giving effect to, the provisions of the federal constitution, not those of the state constitution. Indeed, we submit, they could not have taken a contrary view of the matter, and considered the state constitutional guaranty of due process as authorizing the courts of the state to nullify legislative rate regulations without denying the propriety of what that constitution has ordained with respect to the state railroad commission.

Again, we submit that what is thus true of the judicial history of the state of California, in the enforcement of its local constitutional guaranty of due process, is largely true of the other states in which similar constitutional provisions exist. So that this court could not, without disregarding the plain facts of such history, assume that such provisions are, or would be, construed as subjecting legislative authority in the prescribing of rates to judicial revision, if it had not been for the adoption of the fourteenth amendment to the federal constitution, and the decisions of this court thereunder.

There is thus destroyed, we submit, the whole foundation of defendants' position, that because the bill alleges that complainant will be deprived of its property without due process, contrary to the federal constitution, it also shows that such

deprivation will be contrary to the state constitution.

From the foregoing considerations it follows, we submit, that any person who alleges that he has been deprived of property without due process of law, by any officer or agency of the state of California, in violation of the fourteenth amendment to the federal constitution, necessarily has the right to have the truth of that allegation determined, and relief awarded accordingly, by the federal courts, unless those courts are to abdicate the jurisdiction which has been conferred upon them by the constitution and laws of the United States, as they have heretofore been construed by this court in such cases as Knoxville v. Knoxville W. Co., *supra* (212 U. S. 1.), *Ex parte* Young, *supra* (209 U. S. 123), and the many prior cases cited therein.

VIII.

The Penal Provisions of the Ordinance Here Complained of Deny to Complainant the Equal Protection of the Laws, Regardless of the Reasonableness of the Rates Thereby Prescribed.

The Allegations of the Bill Showing Such Denial of Equal Protection Present a Federal Question Which is Wholly Independent of the Question Whether the Enforcement of the Rate Prescribed by the Ordinance Would Take Complainant's Property Without Due Process of Law.

Such Federal Question Gave the District Court Jurisdiction, Even Though the Case Presents State Questions,

We have now reached the discussion of the last consideration which we shall urge in opposition to the objection to jurisdiction which defendants have here interposed; a consideration which, we shall submit, demonstrates the untenability of that objection independently of all the considerations which we have heretofore presented.

We have already quoted from the decision of this court in *Ex parte* Young, *supra*, its clear affirmation of federal jurisdiction, in such a case as this, because of the alleged confiscatory character of the rate prescribed: i. e., without regard to the penalties or other sanctions by which its enforcement may be secured. But this court fur-

ther held that another distinct ground of federal jurisdiction existed in that case, which it stated thus:

> "Another federal question is the alleged unconstitutionality of these acts because of the enormous penalties denounced for their violation, which prevent the railway company, as alleged, or any of its servants or employees, from resorting to the courts for the purpose of determining the validity of such acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question, at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws, although such obedience might also result in the end (though by a slower process) in such confiscation."
>
> *Ex parte Young*, 209 U. S. 123 (p. 144).

The opinion then proceeded to discuss the merits of that contention: and we have quoted in another connection, a portion of the reasoning by which the contention was sustained. We ask attention now both to the former quotations (from 209 U. S., at pp. 145 to 148), and to the following additional excerpts from the opinion in that case, further exhibiting the grounds of the

decision, and summing up the conclusion of the court:

"Ordinarily a law creating offenses in the nature of misdemeanors or felonies relates to a subject over which the jurisdiction of the legislature is complete in any event. In the case, however, of the establishment of certain rates without any hearing, the validity of such rates necessarily depends upon whether they are high enough to permit at least some return upon the investment (how much it is not now necessary to state), and an inquiry as to that fact is a proper subject of judicial investigation. If it turns out that the rates are too low for that purpose, then they are illegal. Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event.

"We hold, therefore, that the provisions of the acts relating to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment as a result of an unsuc-

> cessful effort to test the validity of the laws themselves, are unconstitutional on their face, without regard to the question of the insufficiency of those rates."
>
> *Ex parte* Young, 209 U. S. 123 (148).

We have also formerly shown, we believe, that the reasoning of this court in the above cited case is entirely applicable to the case at bar: that the difference in the severity of punishment, imposed for a single offense, between the act there in question and the ordinance here involved is not so material in amount as to affect the principle to be applied. For the fines denounced against the complainant corporation itself, as principal, for the violations of this ordinance which would be necessarily committed in demanding a higher rate for even a single month—the rates prescribed are monthly rates—would nearly equal the total value of complainant's physical property, upwards of six million dollars: the fine for each offense being 200 dollars, and the number of complainant's patrons exceeding 30,000. Moreover, each officer and agent of the complainant participating in any of such violations would be subject to like fines, besides imprisonment of one hundred days for each offense. [Bill, pars. XIX, XX; Rec., fols. 23, 24; Ord. secs. 2, 7, fols. 48, 51.]

We submit, therefore, that the ordinance in the case at bar presents precisely the same characteristics which met the condemnation of this court

in the case of *Ex parte* Young, *supra*. Beyond question its penal provisions would have the same effect in cutting off access to judicial relief, that this court there pointed out, in the language we have just quoted.

Now, there is no provision in the constitution of the state of California prohibiting the denial of the equal protection of the laws. Nor, if we mistake not is there any other provision in that constitution which would be given the effect upon a penal rate regulation which was attributed by this court to the guaranty of equal protection under the fourteenth amendment, in *Ex parte* Young, *supra*. Nor have defendants, in their plea, alleged or suggested the existence of any such provision in the state constitution. The court will therefore at once perceive the special bearing which the principle decided in that case has upon the jurisdictional question here raised. The penal provisions of the ordinance here in question, considered by themselves, do not violate any requirement of the state constitution. They could not and would not be pronounced void by the courts of the state, however the question might be raised, except upon the authority of the federal constitution, as interpreted by this court.

It will be argued, perhaps, that the penal provisions of the ordinance would fall with the rate which they are intended to sanction, if that should be held void as unreasonable and confiscatory.

But this—passing all other answers to the proposition—is in no way equivalent to the effect upon these penal provisions which the equal protection guaranty of the fourteenth amendment must have, under the decision of this court in *Ex parte* Young, *supra*. For it was there held, as we have seen, that under that amendment such penal provisions are "unconstitutional on their face, *without regard to the question of the insufficiency of those rates.*"

The necessary effect of this principle of decision upon the case at bar is that the complainant is entitled to go into the federal court and have the enforcement of the penal provisions of the ordinance enjoined, pending a judicial determination of the adequacy of the rates prescribed by that ordinance.

There can be no question, under the decisions of this court, that the federal question thus raised under the equal protection guaranty of the fourteenth amendment sustains the jurisdiction of the court below, even assuming that the alleged inadequacy of the rates presented a state question of such character that, if it were the only question in the case, jurisdiction thereof would be exclusively in the state courts (an assumption which, of course, we do not concede and have earnestly endeavored to disprove).

"It is settled law, as established by well-considered decisions of this court, pro-

nounced upon full argument and after mature deliberation, notably in Cohens v. Virginia, 6 Wheat. 264; Osborn v. Bank of the United States, 9 *id.* 738; Mayor v. Cooper, 6 Wall. 247; Gold-Washing & Water Company v. Keyes, 96 U. S. 199; and Tennessee v. Davis, 100 U. S. 257:— * * *

"That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the constitution or laws of the United States; but when a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is within the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."

Railroad Company v. Mississippi, 102 U. S. 135 (140, 141).

In the leading case of Osborn v. Bank, cited *supra*, Marshall, C. J., thus laid down the rule which has ever since been followed:

"A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party, may be defeated by one construction of the constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Those

other questions cannot arrest the proceedings. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say, it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables congress from authorizing those courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will."

Osborn v. United States Bank, 9 Wheat. 738 (822, 823).

The principle was stated with brevity as well as emphasis in Mayor v. Cooper, cited *supra*, as follows:

"Nor is it any objection that questions are involved which are not all of a federal character. If one of the latter exist, if there be

a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of jurisdiction."

The Mayor v. Cooper, 6 Wallace 247 (252).

Not to multiply citations to a point so well established, we shall only refer to some of the cases applying this principle which we have had occasion to cite in other portions of our argument:

Hamilton Gas Co. v. Hamilton, 146 U. S. 258;

Manigault v. Springs, 199 U. S. 473;

Michigan, etc., R. Co. v. Powers, 201 U. S. 245;

Siler v. Louisville & N. R. Co., 213 U. S. 175.

Consistently with the principle thus long settled in the decisions of this court, we submit that federal jurisdiction of the case at bar cannot be denied without disregarding the positive decision of this court in *Ex parte* Young, *supra*, that such a penal provision in a legislative rate regulation as that here involved is a denial of the equal protection of the laws, and affords an independent ground of federal jurisdiction.

(Before concluding on this point, we would call attention to a feature of the penal provisions of the ordinance in question, which we have inadvertently neglected to mention, namely, the pro-

hibition of discrimination, which would effectually prevent testing the validity of the rates by means of a single violation of the ordinance.)

(Further, under point V, we would urge that the claim of state authority by the defendants, conceded by complainant, coupled with complainant's charge that the acts of defendant (being authorized by the state) deprive it of property contrary to the fourteenth amendment, make out a case of federal question claimed in good faith under the familiar rule stated in

Siler v. Louisville & N. R. Co., 213 U. S. ~~199~~ 175 (p. 191),

and assumed in

Raymond v. Chicago Traction Co., 207 U. S. 20;

Hamilton Gas Co. v. Hamilton, 146 U. S. 258.)

Conclusion.

We shall not further trespass on the time and patience of the court by attempting to summarize the several independent grounds upon which complainant maintains the existence of federal jurisdiction over the cause alleged in its bill herein, as against the objection thereto raised by the plea of the defendants. Such a general view of our several contentions, and of their relations one to the other, is sufficiently afforded by the topical index of points prefixed to the body of our brief.

In conclusion, therefore, we submit that for all of the reasons hereinbefore advanced, the decree of the learned District Court erred in dismissing the bill, for want of jurisdiction, and that the decree should therefore be reversed.

Respectfully submitted,

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